Supreme Court, U.S.
FILED
AUG - 8 2000
OFFICE OF THE CLERK

No. 00-240

IN THE

Supreme Court of the United States

JEFFREY LANE, DAVID VILLALPANDO,
Petitioners,

vs.

HUGHS AIRCRAFT CO.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

1. Is procedural due process violated by a state rule which requires affirmance of a new trial order reversing a jury verdict in a racial discrimination case when the order, copied largely *verbatim* from the losing party's motions, contains numerous factual and legal errors reflecting inattention or disregard of the record and applicable legal principles, incorrectly denies the existence of critical evidence of discrimination and pretext, and contains derogatory references to minority jurors and other evidence of bias?

PARTIES TO THE PROCEEDING

Petitioners: Jeffrey Lane and David Villalpando, Plaintiffs and Appellants in Lane v. Hughes Aircraft Co., California Supreme Court No. S 059064, Los Angeles County Superior Court Case No. BC 075519.

Respondent: Hughes Aircraft Company, Defendant and Respondent in Lane v. Hughes Aircraft Co., California Supreme Court No. S 059064, Los Angeles County Superior Court Case No. BC 075519.

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PETITION FOR WRIT OF CERTIORARI

Jeffrey Lane and David Villalpando, Petitioners herein, respectfully petition the United States Supreme Court for a writ of certiorari to review the decision of the Supreme Court of California filed March 6, 2000. A Petition for Rehearing of that decision was denied on May 10, 2000.

OPINIONS AND ORDERS BELOW

This petition seeks review of the decision rendered herein by the California Supreme Court on March 6, 2000, published as *Lane v. Hughes Aircraft* (2000) 22 Cal.4th 405, 93 Cal.Rptr.2d 60, 993 P.2d 388. (Appendix A hereto) The Second District Court of Appeal rendered Opinions in the action on January 6, 1997 (Appendix D; 59 Cal.Rptr.2d 882, previously published at 51 Cal.App.4th 1601) and again, following directions of the Supreme Court, on July 28, 1997 (Appendix F; 65 Cal.Rptr.2d 889, previously published at 56 Cal.App.4th 1038).

Following the Opinion of the Supreme Court, petitioners filed a Petition for Rehearing, which was denied on May 10, 2000. (Appendix B)

JURISDICTION OF THIS COURT

The decision of the California Supreme Court affirmed an Order granting new trial entered by the Superior Court for Los Angeles County of California on December 15, 1994. (Appendix C) The Order of the

California Supreme Court denying the Petition for Rehearing was entered May 10, 2000. (Appendix B) Jurisdiction of this Court is invoked under 28 *U.S.C.* §1257(a) in that it involves the application of the due process clause under the Fifth and Fourteenth Amendments of the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

California Code of Civil Procedure §657 states, in relevant part:

> On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground

is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

STATEMENT OF THE CASE

A. Plaintiffs' Case at Trial

A unanimous jury found that Hughes Aircraft racially discriminated against Jeffrey Lane, the highest black engineer in his laboratory of 400 to 500 engineers, on evidence that, despite excellent reviews, Lane had been held back and underpaid for over a decade. Lane asserted that he had not been paid or classified comparably to his white peers, that he had been removed from leadership of the "KU Band" project because of his race, had not been transitioned as was promised and as was customary with white engineers, and was otherwise treated in an inferior manner. The jury agreed, also finding that Hughes had retaliated against Lane for filing an internal grievance, making him so ill he had to abandon his career. The jury

further found that David Villalpando, Lane's white supervisor and proponent of Lane's claim of discriminatory treatment, was retaliated against and constructively discharged after resisting management's demand that he give Lane an unwarranted poor evaluation to provide a pretext for punitive action against Lane.

Plaintiffs' case, while indirect, was unusual in that their most powerful evidence came from Hughes' own documents, and from the mouths of Hughes' own witnesses who trapped themselves in an extraordinary number of contradictions and admissions demonstrating pretext and invidious intent.

Hughes' records showed Lane had taken twice the normal time to achieve promotions over a decade when his work evaluations were exceptional. Hughes' own investigator (Susan Goland) admitted Lane was far behind his peers in classification, and said she could only "guess" at a non-discriminatory reason.[1] Evidence

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[1] No witness testified to knowing the actual non-discriminatory reason for Lane's under-classification, as opposed to the hypothetical reasons advanced by Hughes. A guess or theoretical non-discriminatory reason will not carry defendant's burden; there must be competent evidence it was the reason. *Turnes v. AmSouth Bank* (11th Cir. 1994) 36 F.3d 1057, 1061-62, *Uviedo v. Steve's Sash & Door Co.* (5th Cir. 1984) 738 F.2d 1425, 1429-1430; *Impact v. Firestone* (11th Cir. 1990) 893 F.2d 1189, 1194; *Texas Dept. Community*

of pretext flowed freely from Hughes' witnesses. The following gives a little of the flavor of the evidence of mendacity elicited from Hughes' own managers:

- Goland and Hughes manager Hal Solomon denied that she instructed managers to document "poor performance" by Lane, yet Solomon recorded that very instruction in his diary after a meeting with Goland.

- Villalpando was directed by the second-ranked person in the lab (Gavien Miyata) to report on criticism of Lane's performance which Miyata claimed he had overhead at a meeting; the manager allegedly uttering such criticism denied making such comments.

- Hughes' "non-discriminatory" reason for removing Lane as head of KU-Band was his supposed intransigence in regard to future staffing levels. This was destroyed when the head of the lab, Lance Mohler - the man responsible for Lane's removal - admitted that he had authorized and approved Lane's negotiating position, and that he had no criticism of Lane's conduct. Documentation showed that the same staffing levels were later proposed by Lane's white replacement on KU-Band.

Affairs v. Burdine (1981) 450 U.S. 248, 254, 101 S.Ct. 1089.

- It was undisputed that neither Lane nor Villalpando were ever told that staffing levels were the reason for Lane's removal from KU Band, nor informed of any criticism prior to Lane's removal, and that the only evidence of this supposed complaint was a letter fabricated in response to Lane's HR complaint long after his removal.

- Hughes' investigator Goland said at deposition that Lane was removed from KU-Band for poor performance, which was contradicted at trial by Mohler, who said Lane performed well. Goland then abandoned that explanation at trial.

- Mohler testified that he repeatedly ordered Lane's transfer to a promised permanent position in another department, and criticized his staff for failure to do so, though he never exercised his authority to directly effect the promised transfer. His subordinates denied that Mohler ever made such an order or criticism, and said that it was never intended that Lane would have a permanent position there - he was only on temporary loan, contrary to what he had been told. Mohler admittedly never did anything about giving Lane the promised permanent position.

- Hal Solomon admitted telling Lane that his new job would grow into an Assistant Department Manager position, but Solomon knew those positions were being eliminated. Other managers

confirmed that Lane was misled, that there was no consideration of him becoming Assistant Department Manager.

- It was admitted that Lane's promotion from level 6 (which Solomon admitted was long-since earned) was delayed for an extraordinary five months, until October, while, according to Goland, the other promotions put in at the same time were completed by June.

- Goland claimed that Lane (then classified at Level 6) did not do Level 4 work, yet it was uncontradicted that he had been Spacecraft and Ops Manager of Inmarsat 4 (Level 4 jobs according to all accounts) and that those following him in his KU-Band job were Level 3 or 4.

- Goland admitted that documents had been tendered to her by Villalpando supporting the claim that Lane was doing Level 4 work, but the documents were absent from her file, corroborating Villalpando's testimony that she had thrown them back at him.

- Mohler testified that Lane would have gotten the 1991 promotion if he had met Hughes' standards. But that was exactly the rating that Lane got,[2] and

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[2] Since he was acting as Assistant Department Manager, Lane was being evaluated on the basis of

he was still denied promotion.

The jury found that Lane and Villalpando had proved by clear and convincing evidence that Hughes was guilty of malice, oppression, fraud, or despicable conduct. The jury found economic damages of $2,595,000 and general damages of $3.5 million in favor of Lane, and economic damages of $1,425,000 and general damages of $2 million for Villalpando. The jury awarded each plaintiff $40 million in punitive damages.

B. The New Trial and JNOV Orders

Hughes moved for judgment notwithstanding the verdict and for a new trial, asserting that there was no substantial evidence of discrimination or retaliation and that damages were excessive. Despite uncontradicted evidence of differential and unfair treatment, and an array of evidence of pretext coming from Hughes's own witnesses, the trial court, the Hon. Malcolm Mackey, granted both motions by an Order which contained dozens of indisputably false statements of the record, and which obviously rested on fundamental legal errors as to the significance of such evidence. (Appendix C) In fact, the trial court copied 26 of 33 pages of its Order *verbatim* from Hughes' papers (including a letter by Hughes to the California Department of Fair Housing and Employment not in

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Level 4 performance, and not his own Level 6 classification.

evidence), including "facts" having no support whatever in the record.[3] It also contained absurd internal contradictions.[4]

The JNOV order mimicked Hughes' motions exactly, with only slight editing. Judge Mackey copied *verbatim* Hughes' argument that there was *no evidence whatever* of discrimination, unfairness, retaliation or pretext, thus denying the very existence of evidence from Hughes' own documents and witnesses impeaching its story, corroborating plaintiffs' evidence of discrimination and retaliation, and demonstrating pretext. (Appendix C-7 to C-11) The new trial portion of the Order again copied Hughes' claims of no

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[3] Hughes brought in new counsel after the verdict to handle the post-trial motions, which were accordingly prepared by attorneys who had not been present at trial.

[4] For example, the Order falsely states at one place that a supervisor, Phillips, stated Lane's performance was unsatisfactory (Appendix C-4), and at another place correctly states that Phillips said Lane *met* Hughes' standards. (Appendix C-8) The Order states that there was no evidence that Villalpando complained to Hughes that Lane was the victim of racial discrimination (Appendix C-12), but then holds that Villalpando's letter to Hughes' President alleging that Lane had been the subject of racial discriminated should have been excluded as "prejudicial" and irrelevant! (Appendix C-23)

evidence of discrimination. (Appendix C-16)

The Order contained preposterous misstatements of the record which no one present a trial could have believed. To cite a few instances:

- The Order absurdly states that Lane produced no evidence showing pretext (Appendix C-9 to C-11) As noted above, there was abundant pretext evidence from Hughes' own witnesses.

- The Order falsely asserts that Lane never said that his removal was racially discriminatory. His Human Resources Complaint alleged racial bias, and Lane testified that his treatment was due to race. Hughes own investigator and the lab manager (Mohler) said Lane was claiming race discrimination.

- The Order asserts that Villalpando failed to show that he engaged in protected activity, and never told anyone in management that Lane's complaint had merit or that Lane was discriminated against. Hughes' own witnesses said that he strongly supported Lane's complaint and provided documentary evidence. It was unquestioned that he raised discrimination with the division manager and the President of Hughes. Hughes managers themselves said this made Villalpando known as Lane's champion.

- The Order asserts that Lane offered no evidence of emotional distress other than testimony by his

> family and a psychiatrist he saw for only a few hours. "The testimony of the psychiatrist, Dr. Friedman did not offer any medical evidence of emotional distress." (Appendix C-19 to C-20) These statements are absurd. Dr. Richard Katz testified that Lane was seen 70 times for physical therapy and consultation from January, 1992 to January, 1993 in an effort to relieve pain and anxiety, following which he still had physical and psychological complaints caused by stress and discrimination, which contributed to suppression of his immune system. Katz thought that Lane's severe mental and nervous impairment prohibited return to a corporate environment; he placed Lane in the most severe class of mental and nervous impairment.

Dr. Friedman found Lane so severely injured that he could no longer work in a corporate environment or any situation imposing deadlines or similar stress, and that Lane had developed increasingly disabling physical manifestations of emotional problems resulting from discrimination that had "virtually broken him." Examination by a physician for a disability carrier (Dr. Preston) found Lane disabled. Hughes' own psychologist concurred that Lane suffered real injury, and admitted that he had a significant level of psychological disorder, had been disabled due to depression, Chronic Fatigue Syndrome and vulnerability to stress, and represses his depression. The evidence from *both* sides thus contradicted the Order.

The reasoning of the Order reflected a hostile attitude to race discrimination claims, and repeatedly referred to the "minority jury" or jurors, indicating that such jurors were unable by reason of their ethnicity or race to render a dispassionate verdict. (Appendix C-23, C-25, C-26) This attitude was also reflected in the patronizing conclusion that Lane and Villalpando merely "imagined" unfairness.[5]

C. Appellate Proceedings

Plaintiffs appealed, asserting that the factual basis of the order, the copying, and the court's denial of the existence of an abundance of objective evidence emanating from the defense, showed not just an abuse of discretion but wholesale and deliberate failure to independently review and comprehend the evidence: the judge could not have "weighed" evidence the existence of which he denied, and could not have fairly evaluated the case when he professed ignorance of, or failed to understand the legal significance of, evidence supporting the verdict. Plaintiffs also asserted that the Order reflected judicial bias violating due process: "Due process contemplates the opportunity to be fairly heard before an impartial decision-maker." (Appellants' Opening Brief 44)

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[5] The Order also made charges of misconduct against plaintiffs' counsel (Appendix C-23 to C-27) so ridiculous that they were neither raised at trial nor defended on appeal by Hughes.

Plaintiffs discovered during the pendency of the appeal that Judge Mackey had a history of public statements reflecting racial bias. They asked the Court of Appeal to take judicial notice of (1) Judge Mackey's racially derogatory statement in the Los Angeles Times of October 17, 1980, in regard to an Asian woman suing him for child support, "Were this woman white, this situation never would have come up, because this woman [is in] some parts irrational" (emphasis added); and (2) Judge Mackey's order granting JNOV and new trial in Akintunde I. Ogunleye v. Pitney Bowes, Inc., Los Angeles Superior Court Case No. BC 131953, in which (like the Lane case) he recited the defense position on all issues, demonstrated insensitivity to the issue of discrimination, asserted there was no evidence supporting liability or damages, accused plaintiff of hiding his complaints and causing his own damages, and asserted that minorities should be resilient to racially derogatory remarks and not expect the law to chastise such conduct!

The Court of Appeal reversed both the JNOV and new trial order in an Opinion of January 6, 1997 (Appendix D), finding that substantial evidence did indeed support the jury verdict on liability and damages, and that the trial court's new trial order was so ill-founded in its statement of the record and reasoning as to be an abuse of discretion.

The California Supreme Court granted Hughes' Petition for Review and retransferred the case to the Court of Appeal with directions to consider its decision on the new trial order in light of two earlier cases

discussing appellate review of such orders pursuant to *Code of Civil Procedure* §657: *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 148 Cal.Rptr. 389, and *Jones v. Citrus Motors* (1973) 8 Cal.3d 706, 106 Cal.Rptr. 29. (Appendix E)

The Court of Appeal requested additional briefing from the parties on the adequacy and accuracy of the factual specifications in new trial order, and whether it was supported by substantial evidence.

In an Opinion of July 28, 1997, the Court of Appeal again reversed both the JNOV and new trial order, finding them unsupported by the evidence. (Appendix F) In a concluding paragraph, the Court of Appeal summarized:

> In response to our court's third supplemental briefing question whether Lane and Villalpando showed that no reasonable trier of fact could have found for Hughes on the theories stated in the new trial order, Hughes contends Lane and Villalpando could not meet this burden of proof. Based on the entire record, reviewed in light of *Neal, supra,* and *Jones, supra,* we conclude that Hughes' contention lacks merit, and the trial court's grant of a new trial cannot be sustained on the grounds cited by Hughes or the trial court.
> [Appendix F-67]

The California Supreme Court again granted review

to consider, *inter alia*, the proper scope of review of the new trial order. Petitioners again argued that the Order reflected failure of the court to know or independently review the evidence, that it showed bias and hostility toward race-based claims, that it was irrational and indifferent to the actual facts of the case, and that the order demonstrated that Judge Mackey could not have evaluated crucial evidence of discrimination and pretext which he proclaimed did not exist.

The Supreme Court issued an Opinion on March 6, 2000 (Appendix A) in which it simply passed over all the falsities and legal errors in the order, holding in effect that a new trial order which states *some* ground in accordance with the statute in a case in which the jury could have found for the losing party cannot be reviewed or reversed for abuse of discretion based on inaccuracies in presentation of the record or failure to recognize the legal significance of evidence. The Opinion likewise failed to address the manifested bias of the order, apparently regarding it as irrelevant to its validity, and declined to reach any other issue.

REASONS FOR GRANTING THE WRIT

A. Review Should Be Granted To Define Due Process Limitations on a Court's Ability to Reverse a Jury Verdict in a Discrimination Case where the Order Reflects Failure to Evaluate or Understand the Evidence.

In effect, the California Supreme Court held that it is not an abuse of discretion for a trial judge to

manufacture false facts, ignore the record, to overturn a jury verdict upon a legally and factually misconceived understanding of the case, and that in any case where there is conflicting evidence a trial court's order cannot be overturned regardless of a judge's deficiencies in reasoning, in knowledge and understanding of the evidence and law. A judge who fails to recognize evidence of pretext or who disregards evidence in order to weaken one side's case is now free to do so, so long as he can manage to regurgitate the losing party's theory of the case.

Reviewing courts have traditionally accorded a high degree of deference to trial court rulings on the premise that the trial court is more familiar than the reviewing court with the evidence before the jury. Indeed, at times (as in the present case), such orders have been held essentially unreviewable. See 11 Wright, Miller, Kane, *Federal Practice & Procedure: Civil* (1995) §2819, pages 198-206. Unlike other trial court decisions reviewed by a "discretionary" standard, however, a new trial order stands at a fulcrum of competing judicial policies. On the one hand, there is the presumption of the trial court's familiarity with the record and proceedings and greater opportunity to weigh the evidence, as well as an interest in avoiding manifestly unjust jury decisions. On the other hand, the order interferes with the jury's primary function as trier-of-fact and with the litigant's right to decision by jury trial; the presumption is that a new trial will be granted only in the clearest of cases where the verdict works an injustice, and courts will avoid retrials unless absolutely necessary. The presumption is not only that

the trial court has greater familiarity with the record and proceedings, but that the judge has carefully and independently weighed the record in reaching a well-informed and well-reasoned decision only after reviewing the entire record. This tension is reflected in a shift towards increased scrutiny of new trial orders in the Federal courts. 11 Wright, Miller & Kane, *supra*, §2819. The cases reflect growing recognition that basic fairness requires some level of scrutiny to assure that new trial orders are not capricious, arbitrary, ill-informed or unreasonable. Due process affords some restriction on even the most "discretionary" trial court decisions.

The decision of the California Supreme Court in the instant case effectively tears down any protection against unsound reasoning or incomprehension of the evidence by holding that so long as there is some evidence upon which a jury might have found for the losing party, then new trial must be affirmed notwithstanding that the order itself rebuts any presumption of the trial court's thorough, accurate or independent review of the record, and notwithstanding demonstrable errors in the trial court's comprehension of the probative significance of evidence. New trial orders must be affirmed even when the Order itself reflects far-reaching and systematic error in evaluation of the record, or even bias.

Of course, these concerns are present not only in new trial orders but in many sorts of rulings affecting either

the substantive or procedural rights of the parties.[6] They are of heightened concern in racial discrimination cases where the method of indirect proof of racial animus is unfamiliar to many judges, and where some judges may harbor conscious or unconscious biases regarding discrimination claims or claimants. This Court's development of the law from *McDonnell-Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, to the recently decided *Reeves v. Sanderson Plumbing Products* (2000) __ U.S. __, 120 S.Ct. 2097, has been devoted to educating judges in the methods of evaluation of indirect evidence of racial animus in light of increasingly subtle and sophisticated discrimination. *EEOC v. Pape Lift* (9th Cir. 1995) 115 F.3d 676, 684; *Boyd v. Bechtel Corp.* (N.D.Cal. 1979) 485 F.Supp. 610, 612-13. Appellate courts must be diligent in assuring that trial judges have understood the evaluation of indirect evidence and afford due respect to a jury's verdict, reflecting its ability to draw inferences from pervasive and objective evidence impeaching the employer's explanation. Either a judgment or a new trial order which ignores the *prima facie* case established by plaintiff, denies any evidence of pretext, and shows disregard of the legal significance of

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[6] Petitioners recognize that the United States Constitution does not protect the right to jury trial in State Court. However, such a right is recognized under Article I, Section 16, of the California Constitution. The due process clause of the United States Constitution accordingly protects the state-created right against arbitrary judicial interference.

admissions and contradictions from defense witnesses cannot be a valid exercise of the new trial power. As Justice Ginsburg observed in her concurring Opinion in *Reeves v. Sanderson*, the ultimate question of liability should remain with the jury in any case where there is sufficient ground to infer dishonesty on the part of the employer.

Where the underlying claim which plaintiff seeks to vindicate is based on a breach of a fundamental human right, a court's failure to understand the jury's entitlement to infer invidious intent is a substantial impediment to the protection of the underlying right, and thus demands enhanced appellate scrutiny to protect both the substantive and procedural rights of claimants. Similarly, the failure of reviewing Courts to contend with the hostility or insensitivity of some judges towards race or gender based actions poses a barrier to fair trial and fair hearing of such claims. Unless the due process clause imposes on trial judges a meaningful requirement of a fair hearing of the evidence, and requires reviewing courts to assure the trial judge's comprehension of the nature of indirect proof available to plaintiffs and juries in discrimination cases, neither the appearance or actuality of a fair hearing will be preserved, and the cause of civil rights in particular will be ill-served.

This Court has not addressed due process limitations or requirements for the grant of a new trial in a civil proceeding. It has, however, addressed the requisites of due process in a number of contexts which suggest that the Constitution requires enhanced scrutiny and

places limitations upon a trial court's otherwise "discretionary" decisions. While there appear to be no decisions squarely on point, these related decisions concerning fair trials implicate the deficiencies of the new trial order in the present case.

B. Guidance is Required as to When an Order Resting On Misunderstanding of the Facts or Law Constitutes Denial of a Fair Hearing.

While mere error in resolving a question of fact is not a violation of due process where it follows a "scrupulous and diligent search of truth", a "careless or designed pronouncement of sentence on a foundation . . . extensively and materially false" which the party had no opportunity to correct will indeed render a proceeding lacking in fairness and due process. *Townsend v. Burke* (1948) 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (criminal sentence based upon materially false information submitted by prosecutor and erroneous assumptions by the court). See also Justice Brennan's concurring Opinion in *Roberts v. United States* (1980) 445 U.S. 552, 563, 100 S.Ct. 1358, 1365: "As a matter of due process, an offender may not be sentenced on the basis of mistaken facts or unfounded assumptions."

The presence of extensive and easily recognized factual errors and distortions in the order not only refutes the presumption of trial court familiarity with the record and independent review of the evidence which underlies the deferential standard of review, it demonstrates the absence of a basic requisite of a fair

hearing; the obligation of the tribunal to hear and consider all of the evidence before reaching a decision. *Beck v. Quiktrip Corp.* (10th Cir. 1983) 708 F.2d 532, 536.

The due process clause precludes courts from arbitrarily giving no weight whatever to relevant and admissible evidence by excluding it from consideration, just as it imposes limits on a court's ability to restrict evidence. *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115, 102 S.Ct. 869 (criminal sentencing); *Perry v. Rushen* (9th Cir. 1983) 713 F.2d 1447. The right to a fair hearing is meaningless if evidence adduced can be ignored by the tribunal or if evidence manufactured out of the tribunal's imagination forms the basis of decision. *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, states that a person is afforded a hearing precisely to avoid factually unfounded decisions: "when the state must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." This objective is undermined when the decision is founded on factual assertions which (as the Court of Appeal found here) no reasonable person could have believed.

If retrial is required by a juror's failure to pay attention to evidence (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411, 185 Cal.Rptr. 654), by an instruction erroneously directing the jury to disregard important evidence, or by an instruction erroneously describing the probative significance of evidence, then it is equally offensive to have a trial judge sitting as a "thirteenth juror" render a decision which rests on disregard or

misunderstanding of the evidence. No state interest can justify deference to a materially distorted account of the evidence. Yet this is the rule the California Supreme Court has imposed on its courts.

Similarly, how can due process be satisfied by a standard requiring affirmance of a new trial order when the trial court's "weighing" of the evidence reflects a total lack of understanding of the nature of pretext and the rules permitting an inference of invidious intent from falsity and contradictions in the employer's testimony? Judge Mackey professed to find absolutely no evidence of pretext, and no evidence that would allow an inference other than that Hughes acted fairly and conscientiously. Lacking an understanding of the nature of proof in the case, he could not have fairly assessed either the weight of the evidence or whether the jury acted reasonably. *Cf. Binder v. LILCO* (2nd Cir. 1995) 57 F.3d 193, 201-202, in which a new trial order in a discrimination case was held an abuse of discretion because the judge's error in assessing the evidence was shown by an order granting judgment for defense. A serious error in the application of law to fact would seem to require reversal of a new trial order as much as any other sort of decision. *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 402, 110 S.Ct. 2447; *A.C. Aukerman Co. v. R.L. Chaides Construction Co.* (Fed. Cir. 1992) 960 F.2d 1020, 1039; *Del Monte Dunes at Monterey Ltd. v. City of Monterey* (9th Cir. 1996) 95 F.3d 1422, 1426 (mistake of law in new trial order may be corrected on appeal).

Due process must afford some measure of protection

from grossly unsound judicial reasoning: it is fundamentally unfair to allow a judge to make a decision based upon a spurious factual record or erroneous reasoning with the result that a party is deprived of a valid verdict for no good reason. See, *Allstate Insurance Co. v. Hague* (1981) 449 U.S. 302, 326, 101 S.Ct. 633, 647 ("It may be assumed that a choice of law decision would violate the due process clause if it were totally arbitrary or if it were fundamentally unfair to either litigant." (Stevens J. concurring).)

Due process requires that instructions be sufficiently precise that a jury will apply an appropriate standard. *Notaro v. United States* (9th Cir. 1966) 363 F.2d 169, 175; *In Re Winship* (1970) 397 U.S. 358, 363-364, 90 S.Ct. 1068. Why is a similar fidelity to governing law not required of judges? Decisions based upon presumptions or reasoning which have no rational foundation are violative of the right to fair trial. *Western & Atlantic Railway Co. v. Henderson* (1929) 279 U.S. 639, 644, 49 S.Ct. 445.

Under the rule announced by the California Supreme Court, a judge could get all the facts supporting the jury verdict wrong, but if he correctly states one fact supporting the losing party's theory, he is entitled to order a new trial. Yet the judge clearly could not in such a case have made a well-reasoned evaluation of the evidence or of the entire record, and his "hearing" of the evidence would be a travesty. A rule which requires a new trial order to be affirmed irrespective of gross factual and legal errors is incompatible with the requirements of a fair hearing, for it effectively requires

affirmance of an order where the judge has heard only one side. The due process right to a hearing in such case is meaningless, for the evidence adduced at that hearing can be ignored by the tribunal. If the judge can act on the basis of evidence manufactured out of his imagination, the litigants are subjected to an arbitrary and capricious decision process.

The conflict between the rule announced by the California Supreme Court and the above decisions makes this case uniquely suited for clarification of the role of due process in correcting serious factual and legal errors.

C. Review is Required to Clarify when Due Process is Offended by *Verbatim* Copying, or by a Record Reflecting no Effort by the Trial Court to Fully Evaluate the Evidence.

In *Anderson v. City of Bessemer City* (1985) 470 U.S. 564, 105 S.Ct. 1504, the Court considered the constitutional implications of court orders adopting the submissions of parties, noting that it had criticized judges for *verbatim* adoption of findings of fact prepared by prevailing parties, and taking note of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact. However, the Court affirmed the trial court finding where it did not appear that the trial judge "uncritically accepted findings prepared without judicial guidance by the prevailing party" but, rather, provided his own framework for the findings and, instead of adopting the proposed findings, rewrote them in a manner which

varied considerably in organization and content from those submitted by counsel. Under these circumstances, the Court found "no reason to doubt that the findings issued by the District Court represent the Judge's own considered conclusions." See also, *Aiken County v. BSP Division of Envirotech Corp.* (4th Cir. 1989) 866 F.2d 661, 677.

Courts have likewise condemned "ghost writing" which is not the product of personal analysis and determination by the Judge. *In Re Dixie Broadcasting, Inc.* (11th Cir. 1989) 871 F.2d 1023, 1030; *Louis Dreyfus & Co. v. Panama Canal Co.* (5th Cir. 1962) 298 F.2d 733. And they have found that such a practice may amount to deprivation of a fair hearing or decisional process. "Due process is denied a party when a judge adopts a party's order verbatim, without previously conclusively ruling on the matters in it." *Bilzerian v. Shinwa Co. Ltd.* (N.D. Fla. 1995) 184 B.R. 389. While often the subject of disapproval, "ghost-written" orders have generally been found valid where they did not rest on clear factual error. See, *e.g., In re Dixie Broadcasting, supra,* 871 F.2d at 1030. While the present case differs procedurally from the preceding decisions, it presents a similar concern regarding a trial court's failure to independently review, weigh or analyze the evidence, as reflected in the trial court's uncritically and *verbatim* adoption of repeated assertions by Hughes to the effect that there was "no evidence" on crucial issues regarding both liability and damages, the copying of manifestly false descriptions of the testimony of numerous witnesses, and the careless inclusion of inconsistent factual assertions in the order.

"The due process clause entitles a person to impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242, 100 S.Ct. 1610, 1613. Similarly, due process implies a court competent to afford a fair hearing. *Jordan v. Massachusetts* (1912) 225 U.S. 167, 176, 32 S.Ct. 651, 652, 56 L.Ed. 38. As *Marshall* observed, this requirement is to help guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or law, and preserves the appearance and fairness of reality. *Marshall*, 446 U.S. at 242. Yet the Opinion of the Supreme Court of California authorizes uncritical copying as a "practical" measure, without regard to extent or inaccuracy.

D. Guidance is Necessary as to the Obligation of Reviewing Courts to Examine Judicial Bias.

Can a reviewing court turn a blind eye to a judicial officer's derogatory racial stereotyping of minorities, implying that they are not to be trusted in a case of this sort, especially when there is a public record of racially insensitive remarks by the judge? (Appendix C-23, C-25, C-26) A trial court's distortion of the record, indifference to evidence corroborating plaintiff's claim, and unbalanced assessment of evidence reinforces the conclusion that the new trial order was not impartial. *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 42 Cal.Rptr.2d 440. The extraordinarily unbalanced new trial order, with its fatuous attacks on plaintiffs, indicates that this is one of the unusual cases in which a ruling furnishes evidence of extrajudicial bias. *Liteky v. United States* (1994) 510 U.S. 540, 114 S.Ct. 1147, 1157.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625. Due process demands that the tribunal not only be impartial but that "justice must satisfy the appearance of justice." *In re Murchison, supra*, 349 U.S. at 146, quoting *Offutt v. United States* (1954) 348 U.S. 11, 14, 75 S.Ct. 11, 13.

CONCLUSION

The rule announced by the California Supreme Court insulates legally and constitutionally bad decisions from review or correction. It protects poor reasoning and inept, biased or ill-informed judges from scrutiny and thereby undermines both the concept of a fair trial and the public interest in correct substantive decisions, especially in the area of racial discrimination.

Petitioners therefore submit that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX "A"

(22 Cal.4th 405, 993 P.2d 388, 93 Cal.Rptr.2d 60)

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

JEFFREY LANE, DAVID VILLALPANDO,
Plaintiffs and Appellant,
v.
HUGHES AIRCRAFT COMPANY,
Defendant and Respondent.

No. S059064

(Filed March 6, 2000)

(As Modified May 10, 2000;
Rehearing Denied May 10, 2000)

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National Chamber Litigation Center, Stephen A. Bokat, Robin S. Conrad, Washington, Dist. of Columbia, Sussan L. Mahallati; Mayer, Brown & Platt, Andrew L. Frey, Philip A. Lacovara, New York, NY, and Donald M. Falk, Washington, Dist. of Columbia, for Chamber of Commerce of the United States as Amicus Curiae on behalf of Defendant and Respondent.

Fred J. Hiestand, Sacramento, for the Association for California Tort Reform as Amicus Curiae on behalf of Defendant and Respondent.

In this case, we consider the standard applicable to review of an order granting a motion for a new trial under Code of Civil Procedure section 657 (section 657). Consistent with our prior decisions, we hold that such an order "must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory." (*Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710, 106 Cal.Rptr. 28, 505 P.2d 220 (*Jones*).) Because the Court of Appeal did not apply that highly deferential standard in this case, its judgment must be reversed.

I.
FACTUAL AND PROCEDURAL BACKGROUND

The parties dispute many factual issues and emphasize different parts of the conflicting evidence in support of their various contentions. We have no reason to summarize the details of these factual contentions. Jeffrey Lane sued Hughes Aircraft Co. (Hughes) for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, race discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA). (Gov.Code, § 12900 et seq.) Lane, who is African-American, alleged that Hughes failed to promote him to various management positions because of his race and retaliated against him after he complained to Hughes's human resources department.

David Villalpando sued Hughes for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress and retaliation in violation of the FEHA, claiming Hughes demoted him and constructively discharged him for refusing to write a poor job evaluation of Lane.

At trial, Hughes claimed it had removed Lane from a project known as "KU Band" because of a staffing dispute and that Lane's performance thereafter deteriorated. Hughes's witnesses also testified that they did not pressure Villalpando to give a negative report about Lane and that Villalpando did so on his own initiative. Finally, Hughes' witnesses testified that Hughes did not retaliate against Villalpando.

The jury returned verdicts for both plaintiffs, finding

Hughes (1) breached its contracts with Lane and Villalpando by terminating them without good cause and in violation of the implied covenant of good faith and fair dealing, (2) discriminated against Lane because of his race, (3) retaliated against Lane and Villalpando because they reported the discrimination, and (4) constructively discharged Villalpando. The jury also found plaintiffs had "proved by clear and convincing evidence that Hughes ... was guilty of malice, oppression, fraud or despicable conduct," thus qualifying them for punitive damages under Civil Code section 3294, subdivision (a). The jury awarded Lane $295,000 for lost wages prior to trial, $2.3 million for future wage loss, and $3.5 million for emotional distress and other noneconomic damages. The jury awarded Villalpando $125,000 for past wage loss, $1.3 million for future wage loss, and $2 million for emotional distress and other noneconomic damages. At the punitive damages phase of the trial, plaintiffs offered evidence that Hughes's net worth was $1. 6 billion. Plaintiffs' attorney then suggested that the proper measure of punitive damages is 50 percent of a defendant's total wealth--in this case $800 million. The jury awarded each plaintiff $40 million in punitive damages, for a total award of $89,520,000.

On Hughes's motion, the trial court granted a judgment notwithstanding the verdict. (Code Civ. Proc., § 629.) Among other findings, the court found (1) the record did not contain substantial evidence supporting Lane's discrimination and retaliation claims, (2) Hughes never terminated Lane, (3) Hughes did not instruct or force Villalpando to fabricate a poor job evaluation of Lane, (4) Hughes did not retaliate against

Villalpando, and (5) Hughes did not constructively discharge Villalpando. The court also specified it was granting judgment notwithstanding the verdict as to damages for future wage loss because both plaintiffs rejected unconditional offers of reinstatement, and as to punitive damages because there was no clear and convincing evidence of malice.

The court alternatively granted a new trial (§ 657), finding that the record contained insufficient evidence of discrimination and retaliation. It also found insufficient evidence to support the damage award. With respect to punitive damages, the court specifically found that (1) passion and prejudice had motivated the jury, (2) the damages did not bear a reasonable relationship to Hughes's actions or plaintiffs' injuries, and (3) they were grossly disproportionate to the amount of actual damages. In particular, the court noted the case did not involve racist slurs or a pattern of discrimination. The court also granted a new trial because of legal error, including improperly admitting inflammatory evidence and allowing counsel to argue facts not in evidence and to use inflammatory "buzz words." The court concluded "defendant ['s] witnesses ... were not liars, cheats or conspirators as indicated by the plaintiff, but were sincere businessmen and engineers. They were not racist or biased and went out of their way to assist Lane and Villalpando."

Plaintiffs appealed. The Court of Appeal found sufficient evidence in the record to support the jury's verdict as to liability and compensatory damages, and therefore reversed the judgment notwithstanding the verdict. Nevertheless, the court found the punitive damages excessive, noting that the punitive damages

were far greater than the compensatory damages and that the jury did not differentiate between the two plaintiffs. The court concluded that, "[a]s a direct victim of race discrimination, Lane was entitled to a greater award than Villalpando" and reduced Lane's award from $40 million to $5 million and Villalpando's from $40 million to $2,830,000. After the reduction, plaintiffs' total award was $17,350,000.

With respect to the order granting a new trial, the Court of Appeal stated: "[W]e need not consider the trial court's grant of a new trial on the bases of insufficiency of evidence and excessive compensatory damages, as we already analyzed the record with respect to the judgment notwithstanding the verdicts." Thus, the appellate court applied the *same* standard when reviewing the new trial order as when reviewing the judgment notwithstanding the verdict. The court also rejected the trial court's finding that various legal errors deprived Hughes of a fair trial.

Plaintiffs did not petition for review. Therefore, the Court of Appeal's decision to reduce the punitive damage awards (and the method it employed in calculating the reduction) is not before us, and we express no opinion about it.

Hughes petitioned for review arguing, among other things, that the Court of Appeal improperly applied the same standard when reviewing the new trial order as when reviewing the judgment notwithstanding the verdict. Hughes did not challenge the Court of Appeal's ruling with respect to the judgment notwithstanding the verdict. We granted review and transferred the case back to the Court of Appeal with directions to reconsider in light of *Neal v. Farmers Ins.*

Exchange (1978) 21 Cal.3d 910, 932-933, 148 Cal.Rptr. 389, 582 P.2d 980 (Neal) and *Jones, supra,* 8 Cal.3d 706, 710-711, 106 Cal.Rptr. 28, 505 P.2d 220, decisions in which we articulated a highly deferential standard under which new trial orders are reviewed. After transfer, the Court of Appeal reached the same conclusions, and we again granted Hughes's petition for review. We now reverse.

II.
DISCUSSION

The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of "[e]xcessive ... damages" or "[i]nsufficiency of the evidence," section 657 provides: "[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence ... or upon the ground of excessive or inadequate damages, ... *such order shall be reversed as to such ground only if there is no substantial basis in the record for any such reasons.*" (Italics added.) Thus, we have held that an order granting a new trial under section 657 "must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory." (*Jones, supra,* 8 Cal.3d at p. 710, 106 Cal.Rptr. 28, 505 P.2d 220.) Moreover, "[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached . . . ." (*Id.* at p. 711, 106 Cal.Rptr. 28, 505 P.2d 220.) In other words, "the presumption of correctness normally accorded on

appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order." (*Neal, supra*, 21 Cal.3d at p. 932, 148 Cal.Rptr. 389, 582 P.2d 980.)

The reason for this deference "is that the trial court, in ruling on [a new trial] motion, sits ... as an independent trier of fact." (*Neal, supra*, 21 Cal.3d at p. 933, 148 Cal.Rptr. 389, 582 P.2d 980.) Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations.

The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons. (*Jones, supra*, 8 Cal.3d at p. 710, 106 Cal.Rptr. 28, 505 P.2d 220.)

Here, the trial court granted a new trial on the basis of insufficient evidence and stated reasons in support. Specifically, the court found (1) Lane and Villalpando had not established racism or retaliatory bias, (2) Lane's promotion history was comparable to that of whites, (3) Villalpando had not significantly supported Lane's discrimination complaints, and (4) there was no indication of retaliation in management's decision to

assign someone other than Villalpando to lead his section after merging it with another section. These findings undermined the essential assertions that form the basis of the jury's liability verdict, and therefore provided a sufficient basis for ordering a new trial as to liability.

Plaintiffs argue that the court's specification of reasons is too summary and does not establish the requisite degree of deliberation. (See, e.g., *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 697-698, 106 Cal.Rptr. 1, 505 P.2d 193 [the trial court's reasons may not be mere assertions of ultimate fact]; *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 369-370, 90 Cal.Rptr. 592, 475 P.2d 864 [same].) Plaintiffs note in this regard that under section 657 the trial court must "weigh[ ] the evidence" and consider "the entire record." But the trial court's specification was adequate.

First, the specification is not a mere statement of ultimate facts, such as that Hughes did not discriminate or retaliate. Rather, the court also found that (1) Lane's promotion history was comparable to that of whites, (2) Villalpando had not significantly supported Lane's discrimination complaints, and (3) Hughes had a good faith business reason for its management assignments. Moreover, at the beginning of the order, where the court was addressing both the grant of a new trial and the judgment notwithstanding the verdict, it found (1) Hughes did not instruct or force Villalpando to fabricate a poor job evaluation of Lane, (2) Hughes tried to find job opportunities for Villalpando, and (3) Hughes's managers did not refuse to meet with Villalpando after he complained of discrimination.

Second, the context makes clear that, when the trial court stated briefly that it found insufficient evidence of racism and retaliatory bias, it was referring, by way of summary, to the more comprehensive findings it had already made in ruling on the judgment notwithstanding the verdict. Specifically, the court had previously found that (1) Hughes's failure to promote Lane was due to Lane's performance, not his race, (2) Lane's statistical evidence was flawed because it did not indicate the qualifications of employees who were passed over for promotion, (3) Lane was not doing the work of an operations manager and therefore was not entitled to pay at that level, (4) Hughes provided Lane with job opportunities that he did not pursue, and (5) Hughes never terminated Lane. This cross-reference to findings located in a different part of the order was adequate to satisfy section 657. A court need not unnecessarily burden a new trial order by reiterating what it has already said at length with respect to another issue before it (*Mercer v. Perez* (1968) 68 Cal.2d 104, 115, 65 Cal.Rptr. 315, 436 P.2d 315), so long as it makes clear to a reviewing court the basis for its decision. (*Miller v. Los Angeles County Flood Control Dist., supra,* 8 Cal.3d at p. 698, fn. 8, 106 Cal.Rptr. 1, 505 P.2d 193 [permitting the trial court to cross-reference another part of its order].) The trial court's order did that here.

Third, the trial court described in detail why the evidence was insufficient to support the damage award, noting that (1) the expert witness who calculated plaintiffs' wage loss made incorrect assumptions about their prospects for promotion at Hughes, (2) Lane remained able to work despite the events at Hughes, (3)

Villalpando remained able to work in a managerial *position* despite the events at Hughes, and (4) plaintiffs did not suffer significant emotional distress. These findings undermined the evidentiary foundation of the compensatory damage award and therefore provided sufficient basis for ordering a new trial as to compensatory damages. Finally, with respect to punitive damages, the court noted that the award was "excessive" and disproportionate to Hughes's conduct and to the extent of plaintiffs' injury and compensatory damages.

The record also supported the foregoing findings. We emphasize again that, so long as the outcome is uncertain at the close of trial - that is, so long as the evidence can support a verdict in favor of *either* party - a properly constructed new trial order is not subject to reversal on appeal. Here, the evidence could have supported a verdict in Hughes's favor on all causes of action. Plaintiffs did not present irrefutable evidence that Hughes acted without good cause, in bad faith, or unfairly, or that it engaged in fraud, deceit, discrimination, or retaliation. Rather, plaintiffs' allegations depended on circumstantial evidence - company-wide statistics, plaintiffs' promotion and assignment histories and plaintiffs' testimony describing their subjective impressions. Indeed, plaintiffs' counsel conceded that the evidence included no "smoking handgun."

The jury would have been entitled to reject the evidentiary inferences plaintiffs advocated and to disbelieve the testimony of plaintiffs' witnesses in favor of Hughes's evidence. For example, it would have been entitled to find, as the trial court did, that Hughes made

its promotion and assignment decisions regarding Lane for good faith business reasons unrelated to his race and discrimination complaints. In this regard, Hughes managers testified that Lane's removal from KU Band was unrelated to his race; that his performance slacked off after he left KU Band; that his promotion history was comparable to whites at the company; and that Hughes tried to find Lane opportunities in the company.

Furthermore, the jury would have been entitled to accept the testimony of Hughes management that Hughes did not order Villalpando to fabricate negative reports about Lane; that it had a good faith business reason for choosing another employee to lead Villalpando's section after merging it with a different section; and that it tried to find other opportunities for Villalpando in the company. Finally, the jury could have rejected plaintiffs' evidence of damages and accepted instead the testimony of Hughes's witnesses that plaintiffs were capable of working in managerial positions in the aerospace industry despite the events at Hughes, that aerospace jobs were available, and that neither plaintiff suffered serious emotional distress.

Plaintiffs argue the new trial order is invalid because it borrows extensively from briefs filed by defendant. Section 657 provides that the court "shall not direct the attorney for a party to prepare either or both [the new trial] order and ... specification of reasons" supporting it. We give the statute "a reasonable and practical construction" (*Mercer v. Perez, supra,* 68 Cal.2d at p. 115, 65 Cal.Rptr. 315, 436 P.2d 315), bearing in mind its dual purposes - "to promote judicial deliberation before judicial action," and make appellate review more

manageable. (Id. at p. 113, 65 Cal.Rptr. 315, 436 P.2d 315.) Section 657 bars a trial court from imposing upon counsel preparation of new trial orders; it does not prohibit a court from adopting material in a party's brief. Indeed, if a court could not rely on the reasons advanced in the briefs, their utility would be undermined and they would serve little purpose. The "critical factor . . . is whose mental processes are being used, not whose language is being employed."[1] (*Eltolad Music, Inc. v. April Music, Inc., supra,* 139 Cal.App.3d at p. 707, 188 Cal.Rptr. 858.) The trial court satisfies section 657 if its order indicates it deliberated over the issues; we have already concluded the order here complies with that standard.

The Court of Appeal asserted, in support of its decision to reverse the new trial order, that Hughes abandoned its request for a new trial on the issue of liability. Hughes's letter brief in the Court of Appeal does not support this assertion. Rather, Hughes devoted 8 of its 20-page brief to defending the new trial

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[1] "'After all, counsel and the trial court work with the very same box into which all the evidence is placed. It would be silly to expect the court to use the equivalent of a Roget's Thesaurus in "converting" any language used by counsel into language of its own. Such semantic, linguistic gymnastics could not have been intended by the Legislature. There has been an economy of time achieved by using some of the defense material, in the same manner an appellate court would use such material in an opinion.'" (*Eltolad Music, Inc. v. April Music, Inc.* (1983) 139 Cal.App.3d 697, 707, 188 Cal.Rptr. 858.)

order as to liability.

The Court of Appeal also found *Neal* and *Jones* distinguishable. The court pointed out that in Neal the trial court denied a motion for a judgment notwithstanding the verdict, whereas here the trial court granted such a motion. The court added that in *Jones* the opinion did not indicate whether or not the case involved a motion for a judgment notwithstanding the verdict. The Court of Appeal was correct as to both points, but it did not explain why these distinctions have any significance here. We can think of none.

The Court of Appeal further determined it did not need to consider whether the evidentiary record supported the new trial order, "since we analyzed whether sufficient evidence supports the verdicts with respect to the judgment notwithstanding the verdicts." Thus, the court continued to apply the same standard of review to the new trial order it applied to the judgment notwithstanding the verdict. As we have said, this method of analysis was wrong. "[T]he presumption of correctness normally accorded on appeal to the jury's verdict *is replaced* by a presumption *in favor* of the [new trial] order." (Neal, supra, 21 Cal.3d at p. 932, 148 Cal.Rptr. 389, 582 P.2d 980, italics added.)

Finally, the Court of Appeal noted that, "[w]hile the trial court's order sets forth many factual reasons for granting a new trial, many of these facts do not take into account the conflicting evidence in support of the jury verdicts." We reject the premise of this argument. Conflicting evidence -- far from supporting the Court of Appeal's decision to reinstate the jury's verdict -- actually places the new trial order beyond review so long as the conflict relates to the trial court's reasons for

granting a new trial. "An abuse of discretion [warranting reversal of a new trial order] *cannot be found* in cases in which the evidence is in conflict...." (*Jones, supra,* 8 Cal.3d at p. 711, 106 Cal.Rptr. 28, 505 P.2d 220, italics added.)

Hughes challenges the award of damages for future wage loss and also argues the Court of Appeal should have remanded for a new trial rather than modifying the punitive damage award. In light of our conclusion upholding the new trial order, we need not reach these issues. The new trial may result in a defense verdict, which would make them moot. Moreover, Hughes can argue these points during the course of the retrial and any subsequent appeals.

In conclusion, we reaffirm the deferential standards of review articulated in *Neal* and *Jones* and hold that the Court of Appeal did not apply these standards properly in this case.

CONCLUSION

The judgment of the Court of Appeal is reversed and the cause is remanded with instructions to affirm the new trial order.

BROWN, J.
GEORGE, C.J., KENNARD, J., BAXTER, J.W, WERDEGAR, J., and CHIN, J., concur.

CONCURRING OPINION BY MOSK, J.

I concur in the majority opinion. I write separately to disagree with the views expressed in Justice Brown's

concurring opinion (hereinafter concurring opinion). Although no measure adopted by the Legislature so provides, the concurring opinion advocates a brand of judicial lawmaking by declaring that punitive damages must not, absent some special, unspecified showing, exceed actual damages by more than three times. Such a rule cannot be justified.

I.

"The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, 148 Cal.Rptr. 389, 582 P.2d 980, fn. 13 (*Neal*).) In *Neal*, we set forth three factors relevant to the assessment of punitive damages: (1) the degree of reprehensibility of the act; (2) the amount of compensatory damages awarded; (3) the wealth of the particular defendant. (*Neal, supra*, 21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d 980.) The concurring opinion proposes to fix a "soft" ceiling on punitive damages by using only *one* of the three *Neal* factors - the amount of compensatory damages. But the primary purpose of compensatory damages is fundamentally different from punitive damages - to make plaintiffs whole, not to deter future harm. There is simply no reason why punitive damages should be limited by some fixed ratio to actual damages.

What the United States Supreme Court stated in the context of a due process analysis of punitive damages is directly relevant here: "[W]e have consistently rejected the notion that the constitutional line [for limiting punitive damages] is marked by a simple mathematical formula, even one that compares actual

and potential damages to the punitive award. [Citation.] Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809, fn. and italics omitted.) Given that the "simple mathematical formula" has been rejected in the constitutional context because it is illogical, and given that no such formula has been dictated by statute, it is difficult, to say the least, to see why we should impose the rule by judicial fiat, as the concurring opinion proposes.

Our case law reveals a number of instances of intentionally harmful conduct in which only nominal actual damages were awarded because such damages were difficult to quantify, but in which punitive damages hundreds or thousands of times greater were assessed. (See, e.g., *Werschkull v. United California Bank* (1978) 85 Cal.App.3d 981, 149 Cal.Rptr. 829 [$1 of actual damages and $550,000 in punitive damages for trustee's breach of fiduciary duty]; *Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 104 Cal.Rptr. 591 [no damages in slander case but $3,000 in punitive damages]; *Sterling Drug v. Benatar* (1950) 99 Cal.App.2d 393, 221 P.2d 965 [$1 nominal damages and $200 punitive damages for violation of Fair Trade Act]; *Clark v. McClurg* (1932) 215 Cal. 279, 9 P.2d 505 [same, 0 to $5,000 ratio].) In these cases, the seriousness of the

defendant's misconduct was more important than actual damages in gauging the appropriate amount of the punitive damages award. Indeed, this court has emphasized that none of the three Neal factors can be dispensed with in calculating punitive damages awards. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 111, 284 Cal.Rptr. 318, 813 P.2d 1348.)

To put the matter in other terms, the concurring opinion would flatten out the variability of punitive damage awards by de-emphasizing two important factors used to determine such damages: the extent of the defendant's misconduct and its wealth. As such, the worse the defendant's misconduct, and the greater its wealth, the more it stands to benefit from the concurring opinion's proposed damages limitation.

There appears to be a consensus among researchers that, media perceptions notwithstanding, large and disproportionate punitive damage awards are not a problem in our judicial system in any significant degree -- there is no punitive damages crisis. (See Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry* (1998) Wis.L.Rev. 15, 54-55.) The concurring opinion concedes as much. (Conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at pp. 73- 74, 993 P.2d at pp. 339-400.) Nor are punitive damages a problem in this case, once the proper standard for granting a new trial is enforced. Why does the concurring opinion propose to judicially reform punitive damages? The principal reason given is that such damages are awarded by juries in an arbitrary fashion. But it concedes that the very commentators who criticize punitive damages for their arbitrariness have also criticized reforms like that proposed by the concurring

opinion as being at odds with punitive damages' central purpose of deterring wrongful conduct. (See Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law*) (1998) 107 Yale L.J.2071, 2127 ["no theory of punitive damages justifies a [compensatory damages] multiplier approach"].)

Nor is there any indication, as the concurring opinion suggests, that large compensatory damages awards render substantial punitive damages awards unnecessary. On the contrary, commentators have pointed out that punitive damages may partially remedy the systematic undercompensation of plaintiffs in the tort system. (See Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - and Why Not?*, 140 U.Pa. L.Rev. (1992) 1147, 1220-1221.)

While acknowledging that large, undeserved punitive damages awards are not a common occurrence, the concurring opinion finds fault with our current punitive damage system in part because "it distorts settlements by adding disproportionate leverage to a plaintiff's demands...." (Conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at p. 76, 993 P.2d at p. 402.) But it cites no evidence, and there is no indication, that this supposed "disproportionate leverage" on the part of tort or employment discrimination plaintiffs is a problem. On the contrary, there is evidence that plaintiffs are often at a considerable economic disadvantage, particularly individuals suing large corporate entities. (See Cady, *Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damages Caps* (1997) 25 Hofstra L.Rev. 1005, 1011.)

II.

Aside from this generalized attack on punitive damages, the concurring opinion must answer two questions to justify its position: (1) why choose compensatory damages as the measure of punitive damages? and (2) why three times actual damages? In order to answer both these questions, the concurring opinion cites a number of statutes in which the Legislature has provided for double or treble damages as part of a statutory scheme. It concludes: "The statutory web anchors two observations. First, the Legislature has selected compensatory damages as the best, albeit imperfect, metric for calibrating the punitive component of a damages award. Second, the Legislature has determined that double or treble damages is, in most circumstances, sufficiently punitive." (Conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at p. 75, 993 P.2d at p. 401.)

I disagree with both "observations." The Legislature has in many statutes provided for punitive damages *without* double or treble limitation, or in fact any limitation. Of course, Civil Code §3294, the statute generally authorizing punitive damages in noncontract cases, is the most significant example of such a statute. But there are many others as well. (See, e.g., Bus. & Prof.Code, §14340 [punitive damages authorized for seizure of noncounterfeit goods]; (Civ.Code, §1708.7, subd. (c) [punitive damages for tort of stalking]; *id.*, §1780, subd. (a)(4) [punitive damages under the Consumer Legal Remedies Act]; *id.*, §1786.50, subd. (b) [punitive damages for willful violation of Investigative Consumer Reporting Agencies Act]; *id.*, §1789.21, subd. (a) [punitive damages for violation of Credit

Services Act].) Moreover, there are other statutes where punitive damages are authorized, but with a numerical cap. (See, e.g., *id.*, §1785.31 [punitive damages of not more than $5,000 for violations of Consumer Credit Reporting Agencies Act]; *id.*, §1788.30 [punitive damages of up to $1,000 for unlawful debt collection].) Yet other statutes specify that no punitive damages are to be awarded. (See, e.g., Bus. & Prof.Code, §17550.51 [Travel Consumers Restitution Corporation not liable for punitive damages].) Indeed, my research reveals that there are over 150 California statutes that address punitive or exemplary damages. Taking the concurring opinion's figure that double and treble damages are used in "more than 30 instances" (conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at 74, 993 P.2d at 401), we must conclude that the Legislature has used double or treble damages as a limit on punitive damages in a small minority of the statutes in which it has chosen to address punitive damages.

Thus, the generalization that "the Legislature has selected compensatory damages as the best ... metric for calculating the punitive part of the damages award" (conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at p. 75, 993 P.2d at p. 401.) is simply inaccurate. Rather, all we can safely generalize, after observing the entire patchwork of punitive damages statutes, is that the Legislature has enacted a number of statutes containing a variety of responses to punitive damages, some providing double damages, some treble damages, some providing monetary caps, some prohibiting punitive damages altogether, and many statutes permitting punitive damages without limitation. The unmistakable inference to be drawn from this patchwork is that the

Legislature knew how to limit punitive damages as a multiple of compensatory damages, and in many instances, including the statute broadest in scope, Civil Code section 3294, declined to do so. (See *People v. Birkett* (1999) 21 Cal.4th 226, 233-234, 87 Cal.Rptr.2d 205, 980 P.2d 912.) Given that inference, by what right may this court second guess the Legislature and import a damages limitation, even a "soft" limitation, when the Legislature has deliberately declined to impose one? By what right may we arbitrarily prefer treble damages to the other statutory methods of dealing with punitive damages? Indeed, the concurring opinion's citation of a number of states that have chosen, by statute, a double or treble damages limitation (see conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at p. 75, 993 P.2d at p. 401, citing *BMW of North America, Inc. v. Gore, supra*, 517 U.S. at pp. 614-616, 116 S.Ct. 1589 (Appen. to dis. opn. of Ginsburg, J.)), only serves to underscore the essentially *legislative* nature of the reform it is proposing.

There may indeed be some validity to the cautious extension of statutory rules into areas of common law. This was the method advocated by Chief Justice Traynor in his article, *Statutes Revolving in Common Law Orbit* (1968) 17 Cath. U. L.Rev. 401. A classic example is the use of penal statutes to establish standards of care for purposes of tort liability in instances in which a penal statute does not technically apply. (*Id.*, at pp. 415-417.) A similar method was employed in *Moragne v. States Marine Lines* (1970) 398 U.S. 375, 390, 90 S.Ct. 1772, 26 L.Ed.2d 339, cited by the concurring opinion, in which the United States Supreme Court overruled an outdated common law

admiralty doctrine disallowing wrongful death actions after acknowledging the universal legislative recognition of such actions. But granting the validity of Chief Justice Traynor's method, and indeed even putting aside the problematic fact that we are engaging not in creation of common law but in statutory construction, this method is not correctly applied by the concurring opinion. The success of the method depends on a unified, coherent expression of legislative policy embodied in a statute or statutes from which a common law rule can be derived. But as discussed above, there is no unified, coherent legislative policy regarding punitive damages, and certainly treble damages does not represent such a policy. The concurring opinion's proposal is therefore nothing more than the arbitrary imposition of a soft numerical limitation on punitive damages. Legislatures can impose such numerical limitations.[2] Courts cannot.[3]

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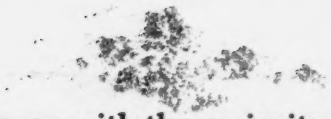
[2] In characterizing the numerical limitation of punitive damages as a legislative task, I express no opinion as to whether there are any state constitutional limits on punitive damages reform. (See *State ex rel. OATL v. Sheward* (1999) 86 Ohio St.3d 451, 715 N.E.2d 1062, 1090-1091.)

[3] The concurring opinion implies that I view the judicial function as a passive one. I do not. Judicial innovation in areas of law not governed by Constitution, statute, or regulation is vital to our common law tradition. Judges working in that tradition must adapt venerable principles and doctrines to meet new needs. (See, e.g., *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 163 Cal.Rptr. 132, 607

The Legislature has, to be sure, delegated to the courts the task of reviewing damages awards and determining when they are "excessive" under Code of Civil Procedure section 657, and this includes punitive damages. Our previous attempts to define the factors to be considered in determining whether an award is excessive were fully consistent with this review function, and with the punitive damages' primary purpose of deterring wrongful conduct. (See *Neal, supra*, 21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d 980.) The constitutional constraints on punitive damages articulated by the United States Supreme Court provide further guidance for lower courts. (See *BMW of North America, Inc. v. Gore, supra*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809.) There is no reason to suppose that judicial review of punitive damages awards following *Neal* and *BMW* is not working adequately to restrain excess punitive damages. But even if courts require still further guidance, the arbitrary judicial imposition of a ceiling on punitive damages of no more than three times actual damages is not the answer, for all the reasons explained above.

CONCURRING OPINION BY BROWN, J.

P.2d 924 [holding that persons unable to identify a particular drug manufacturer that injured them may jointly sue all manufacturers of the drug on an enterprise liability theory].) The imposition of numerical caps on damages, however, is an essentially legislative function.



I, of course, agree with the majority opinion as far as it goes. I write separately to address the punitive damages issue in greater detail. In my view, it is not enough merely to reaffirm that the standards for reviewing a new trial order are deferential and then to dispose of this case on that ground. The Legislature has expressly authorized trial courts to grant new trials when damages are "excessive" (Code Civ. Proc. §657 (section 657)), and the trial court here granted a new trial as to punitive damages on that ground. Our role as the final interpreter of state law obligates us to give meaning to the term "excessive" in relation to punitive damages. Otherwise, the deferential standards of review that we reaffirm today will inhibit us in providing guidance to trial courts as to how their broad discretion should be exercised. (See, e.g., *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932, 148 Cal.Rptr. 389, 582 P.2d 980 (*Neal*) [discussing factors relevant to assessing the size of a punitive damage award though the rule of deference would have provided a sufficient basis to affirm].) In other words, though we defer to trial court rulings, our deference does not free us from the obligation to inform those courts of the considerations we think relevant to their decisions. The point is particularly significant here because, without clear guidance, judicial oversight of punitive damage awards will not be uniform, and the resulting gross variability in awards will ultimately implicate the rights of defendants to due process and the equal protection of the laws under our state Constitution. (Cal. Const., art. 1, § 7, subd. (a).)

Here, the trial court found excessive under section 657 a punitive damage award of $80 million. Plaintiffs

argue Hughes's wealth justifies this large award. The wealth of a defendant is clearly relevant when determining the size of a punitive damage award, as is the amount of the compensatory damages and the reprehensibility of the defendant's conduct. (*Neal, supra*, 21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d 980; see also *Adams v. Murakami* (1991) 54 Cal.3d 105, 110-111, 284 Cal.Rptr. 318, 813 P.2d 1348.) But merely to state what is "relevant" offers little in the way of concrete guidance. Without a beginning point of reference, punitive damage awards tend to vary widely, depending as much on the vicissitudes of jury decision making as on the facts of the case. This variability can result in disparate and fundamentally unfair treatment of similarly situated defendants, a possibility we should not ignore.

Significantly, the variability in punitive damage awards does not flow so much from any inherent inability of different juries to agree on the wrongfulness of specific conduct. Rather, it results from the way courts ask juries to measure that wrongfulness. If the same evidence were presented to 10 separate juries and each was asked to decide a concrete question of historical fact, we would likely see a reassuring level of uniformity; each jury would be selecting the most plausible fact scenario from a fixed set of options based on specific evidence. Similarly, if 10 juries were asked to rate the egregiousness of a defendant's conduct on a scale of 1 to 6, we again would likely see a reassuring level of uniformity; in that case, the range would be "bounded and anchored ... at both ends" and thus the valuations of all juries would be calibrated to the same scale. (Sunstein et al., *Assessing Punitive Damages*

(with Notes on Cognition and Valuation in Law) (1998) 107 Yale L.J. 2071, 2106 (*Assessing Punitives*); see generally, *id.* at pp. 2098-2100.) But if we were to ask the same juries to assess the appropriate dollar amount of punitive damages, we would likely see widely varying valuations because, in that case, the upper end of the scale would be "unbounded" while the lower end would remain "defined by a meaningful zero point." (*Id.* at p. 2106; see generally, *id.* at pp. 2103, 2105.) This phenomenon, which results from the use of a "magnitude scale" without a "modulus," is widely recognized by psychological researchers, who structure their tests in order to account for its effect. (*Id.* at p. 2106 & fn. 138.)

The variability in punitive damage awards does not, therefore, reflect any inconsistency in jury factfinding, merely that awards are not calibrated to a common scale. (*Assessing Punitives, supra*, 107 Yale L.J. at pp. 2106- 2107.) Nevertheless, jury determinations of punitive damages are likely to contain an element of arbitrariness as long as the awards remain uncalibrated. To assure basic fairness, courts must consider ways of calibrating punitive damage awards. (*Id.* at p. 2110 ["To obtain the virtues associated with the rule of law, ... the legal system should counteract the arbitrariness that comes from the unbounded scale of dollars."].) We must ask what anchoring variable will make an award of punitive damages an appropriate measure of punishment rather than a test of a jury's ability to imagine big numbers.

There is no question that juries have broad discretion to determine damages. "The measure of damages suffered is a factual question and as such is a subject

particularly within the province of the trier of fact." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12, 118 Cal.Rptr. 184, 529 P.2d 608.) But discretion must be distinguished from whim and serendipity. In the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record. In arguing for this standard, I do not mean to suggest that three times compensatory damages is a benchmark measure of punitive damages. (Cf. *Assessing Punitives, supra*, 107 Yale L.J. at p. 2127 & fn. 191.) Far from it. The standard is *an uppermost limit*, and most punitive damage awards should fall well *below* that limit. (See Eisenberg & Wells, *Punitive Awards after BMW, a New Capping System, and the Reported Opinion Bias* (1998) Wis. L.Rev. 387, 420, 422 (*Punitive Awards*) [charting punitive damage awards for all states in 1992 and for California from 1960-1984].)

Commentators have criticized reforms of the kind suggested here, of course. The chief criticism is that, though some sort of calibration of awards is necessary to ensure fairness to defendants, use of compensatory damages as the calibrating factor is arbitrary. (See, e.g., *Assessing Punitives, supra*, 107 Yale L.J. at p. 2127; Polinsky & Shavell, *Punitive Damages: An Economic Analysis* (1998) 111 Harv. L.Rev. 869, 900 (*Economic Analysis*).) In other words, if the purposes of punitive damages are deterrence and retribution, then the amount of compensatory damages - the amount of harm the defendant caused the plaintiff - is irrelevant. For example, if a defendant can easily conceal its

conduct or otherwise escape responsibility, a large punitive damage award may be necessary to achieve the appropriate level of deterrence, even if the amount of harm to the plaintiff is relatively small. Similarly, if a defendant does something particularly reprehensible, such as firing a gun into a crowd, a large punitive damage award may be appropriate, even if the bullet providentially lodges harmlessly in a tree. (*Ibid.*)

However, while deterrence and retribution are part of the equation, fundamental notions of justice require some correlation between punishment and harm. Getting too little good is suffering injustice, and getting too much is doing injustice. (Aristotle, Nicomachean Ethics (Hackett Pub. Co. 1985) p. 135.) We expect the punishment to fit the crime. Thus, the use of compensatory damages as a calibrating factor, even if imperfect, is not wholly arbitrary because the degree of harm to the plaintiff bears a substantial relationship to the appropriate punishment. (*Neal, supra*, 21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d 980.) The use of compensatory damages as a calibrating factor has a long history, dating back at least 700 years. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 581, 116 S.Ct. 1589, 134 L.Ed.2d 809.) Juries naturally select compensatory damages as a calibrating factor when determining punitive damages. In fact, statistical studies establish that "[a]bout half the variance in punitive awards is explained by the level of compensatory awards." (*Punitive Awards, supra*, Wis. L.Rev. at p. 393, fn. omitted.) This correlation may indicate the extent to which the adage "no harm, no foul" embodies widely shared notions of basic fairness in our society.

Moreover, large compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves. The magnitude of such awards should be considered in deciding whether and to what extent punitive damages should be imposed. We ourselves have pointed the way. "Punitive damages can be justified only as a deterrent measure or as retribution." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106, 23 Cal.Rptr.2d 101, 858 P.2d 568.) But "the additional deterrent value of punitive damages" might not be needed if the "actual damages, alone, represent a potentially crushing liability..." (*Ibid.*) We should follow the lead of other courts in implementing this observation. (See, e.g., *Beliz v. W.H. McLeod & Sons Packing Co.* (5th Cir.1985) 765 F.2d 1317, 1332 ["Deterrent effect may be achieved without awarding exemplary damages. Whether an award accomplishes this purpose, in addition to affording compensation, is determined by considering not only the amount allowed to each plaintiff ... but also the total amount of the award...."]; *Mairoino v. Schering-Plough Corp.* (Ct.App.Div.1997) 302 N.J.Super. 323, 695 A.2d 353, 370 [Punitive damage award not necessary where "the large compensatory damage award ... by itself provided significant deterrence even to an employer as large as [defendant]."].)

This dual effect of compensatory damages is especially strong when there is a large award for noneconomic harms. This point is well made in the Sunstein law review article: "[A]lthough pain-and-suffering awards are essentially compensatory, there can be little doubt that such

awards sometimes reflect jury judgments about the egregiousness of the defendant's behavior. Hence such judgments are likely to have a punitive component." (*Assessing Punitives, supra*, 107 Yale L.J. at p. 2133.) The trial court should instruct the jury that in determining whether to impose a punitive damage award and, if so, its magnitude, the jury should consider the amount and punitive or deterrent effect of its compensatory damage award. Only if the jury finds the compensatory damage award insufficient to punish or deter should an additional punitive award be imposed. And if imposed, the punitive award must be limited to an amount needed to deter and punish when added to the sum already imposed as compensatory damages. Courts, too, should consider this same factor in deciding whether an award is excessive and, perhaps, in deciding whether to present the question of punitive damages to the jury in the first place.

We already ask juries to consider the reprehensibility of the defendant's conduct. Some commentators argue juries should also consider the defendant's ability to escape responsibility. (*Economic Analysis, supra*, 111 Harv. L.Rev. at pp. 898-899; but see *Assessing Punitives, supra*, 107 Yale L.J. at pp. 2111-2112.) Though these considerations might provide important guidance, they are not anchors that can serve to calibrate a jury's award to a common scale in the way compensatory damages can.

There is a related benchmark trial courts should consider in administering section 657. In more than 30 instances, the Legislature has provided for double or treble damages as a punishment for wrongful acts. (See, e.g., Bus. & Prof.Code, §§17537.4 [unlawful

advertising], 21140.4 [violations of regulations governing fuel franchises]; Civ.Code, §§ 1812.9 [willful violation of laws governing retail installment sales], 1947.10 [evictions based on fraudulent intent to occupy], 3345 [unfair or deceptive practices against senior citizens or disabled persons]; Lab.Code, §206 [failure to pay certain wages].) Indeed, we are unable to find any context in which it has mandated a *greater* multiplier than three, notwithstanding the egregiousness of the wrong. Although none of these statutes is directly applicable here, "a legislative policy [may be] a source of law" (*Van Beeck v. Savine Towing Co.* (1937) 300 U.S. 342, 351, 57 S.Ct. 452, 81 L.Ed. 685), and statutes "are to be regarded as starting points of reasoning." (*Pope v. Atlantic Coast Line R. Co.* (1953) 345 U.S. 379, 390, 73 S.Ct. 749, 97 L.Ed. 1094 (dis. opn. of Frankfurter, J.).) Thus, "[c]ourts that fully appreciate their . . . obligations with respect to decisional law will not be deterred from a desirable result by inference from legislative silence, but only by some indication of legislative intent to preclude the proposed result." (Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases* (1982) 50 Geo. Wash. L.Rev. 554, 567, fns. omitted; *Moragne v. States Marine Lines, Inc.* (1970) 398 U.S. 375, 392, 90 S.Ct. 1772, 26 L.Ed.2d 339 ["In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical."].)

The statutory web anchors two observations. First, the Legislature has selected compensatory damages as

the best, albeit imperfect, metric for calibrating the punitive component of a damages award. Second, the Legislature has determined that double or treble damages are, in most circumstances, sufficiently punitive. (See also Civ.Code, §3426.3, subd. (c) [limiting punitive damages under the Uniform Trade Secrets Act to *two* times other damages].) Because punitive damages are "in addition to ... actual damages" (Civ.Code §3294), an award of treble damages corresponds to a punitive damage award that is two times compensatory damages. Thus, the conclusion that large punitive damage awards should rarely exceed *three* times compensatory damages gives significantly greater leeway to juries than the Legislature has seen fit to give in these analogous contexts.

The statutes of other jurisdictions are also relevant. (See *In re Waltreus* (1965) 62 Cal.2d 218, 224, 42 Cal.Rptr. 9, 397 P.2d 1001 [borrowing from federal law in order to develop our common law rules of criminal procedure].) It is significant that our sister states have most frequently selected two or three times compensatory damages as the appropriate limitation on punitive damages. These jurisdictions include Connecticut, Delaware, Florida, Illinois, Indiana, Nevada, North Dakota, Oklahoma and Texas. (See *BMW of North America, Inc. v. Gore, supra*, 517 U.S. at pp. 615-616, 116 S.Ct. 1589 (appendix to dis. opn. of Ginsburg, J.).) Moreover, several jurisdictions have imposed stricter dollar limits (*ibid.*), even in the case of intentional and malicious discrimination. (See 42 U.S.C. §1981a(b)(3) [upper limit of $300,000].) Thus, the limitation I would urge the courts to consider is a

relatively modest one, allowing ample flexibility by authorizing courts to approve awards that exceed the limit where appropriate.

At trial, plaintiffs stressed that a defendant's wealth is relevant to determining punitive damages, and argued the extent of that wealth provides an adequate upper limit on a punitive damage award. Wealth is relevant, but it cannot provide an adequate upper limit. Many of the wealthiest defendants are corporations, and the size of a corporate defendant is not an additional evil that in itself warrants an enhanced penalty. (*Economic Analysis, supra*, 111 Harv. L.Rev. at pp. 910-914.) In order to remain competitive, large corporations count small as well as big costs, particularly if those small costs may be recurrent. Therefore, even for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct. Moreover, above a certain level, the precise amount of a defendant's wealth becomes less relevant, compared to other factors, in determining an appropriate punitive damage award. Accordingly, trial courts should not permit attorneys to argue, as plaintiffs' attorney argued here, that punitive damages should be a fixed percentage of the defendant's total net worth.

On the other hand, punitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes. In contract law, we recognize "'efficient breach[ ]'" as being socially beneficial (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 98, 44 Cal.Rptr.2d 420, 900 P.2d 669), but in the law of

punitive damages there is no such thing as "efficient" oppression, fraud or malice. The purpose of punitive damages is to *prevent* oppression, fraud and malice, not merely to force defendants to internalize the social costs of that conduct. Or, put more accurately, the hidden or unquantifiable social costs of oppression, fraud and malice are so high that the Legislature has determined such conduct has no social benefit. In sum, the law of punitive damages does not punish a large corporation simply for being large; it takes wealth into consideration so as to ensure the award creates an adequate deterrent, even though the award may still be small in relation to the corporation's net worth. (See, e.g., *Neal, supra*, 21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d 980 and cases cited therein; see also BAJI No. 14.72.2 (8th ed.1994).) In light of these principles, the full extent of a defendant's wealth provides too unbounded an upper limit to be a suitable means to calibrate punitive damage awards. See 42 U.S.C. §1981a(b)(3) [taking defendant's size into consideration, but imposing $300,000 limit applicable regardless of size].)

We read often in the popular press of large punitive damage awards. In practice, however, such awards rarely exceed three times compensatory damages. (See, e.g., *Punitive Awards, supra*, Wis. L.Rev. at pp. 420, 422.) Commentators have cited this lack of a punitive damages crisis as a reason to go slow with respect to reforms. (See, e.g., Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry* (1998) Wis. L.Rev. 15, 69.) But arbitrariness in punitive damage awards, even if only occasional, does not affect jury verdicts alone; it distorts settlements by adding

disproportionate leverage to a plaintiff's demands, as well as uncertainty. Rather than weighing in favor of no reform, the absence of a punitive damages crisis establishes that a "soft ceiling" is unobjectionable - it will have a direct impact on relatively few cases. The standard advanced here would not affect small awards at all, and in the case of large awards, it would screen out only those that are especially suspect because of the extent they exceed the level of the plaintiff's harm. And even in those few cases, no firm limit is proposed; rather, a suggestion for greater scrutiny of the award, whereby the trial court would favorably consider a new trial motion unless it could articulate specific evidence in the record justifying the high award.

We need not decide the precise measure of punitive damages in this case, but in my view the foregoing discussion is essential to the new trial issue that is before us. When setting punitive damages, a jury does not have the perspective, and the resulting sense of proportionality, that a court has after observing many trials. One of the primary checks against excessive punitive damage awards, essential to ensuring procedural fairness with respect to these awards, is the discretion - and, in some cases, the duty - of trial judges to order new trials. (See, e.g., *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 453, 198 Cal.Rptr. 155, 673 P.2d 743 ["trial courts have traditionally exercised the authority to reduce excessive punitive damage awards"].) As California's highest court, it is our responsibility to give guidance to the trial courts.

Justice Mosk writes separately, not to comment on the majority opinion, but to accuse me of a "generalized

attack on punitive damages." (Conc. opn. of Mosk, J., *ante*, 93 Cal.Rptr.2d at p. 69, 993 P.2d at p. 396.) He misapprehends the point of this exercise. The Legislature has authorized the award of punitive damages - an act clearly within its purview. By enacting section 657, the Legislature has also, as Justice Mosk concedes, conferred on courts the responsibility to define and restrain excessive damages, including punitive damages. (Conc. opn. of Mosk, J., *ante*, at p. 71, 993 P.2d at p. 398.) Given the infinite range of misconduct and harm which can give rise to claims for punitive damages, it seems both reasonable and necessary to leave the fine- tuning to the courts. It seems equally reasonable for the courts, in developing case law pursuant to the statute, to look to what the Legislature has done in an analogous context. That context, of course, is the civil penalty statutes in which ceilings on recoverable damages have been imposed. These statutes furnish a reliable guide to what the Legislature regards as *not* excessive. And the fact the Legislature imposed no damages limitation in particular penalty statutes says nothing about the kind of limitations appropriate in the case of punitive damages. Why? Because the Legislature has *already* imposed a statutory ceiling on such awards by expressly providing for new trials in the case of "excessive damages."

The target of "attack" is thus not punitive damages, but arbitrariness - a due process concern. Nor does the standard outlined here ignore the other *Neal* factors; it acknowledges that particularly egregious circumstances may justify very large punitive damage awards. By asking trial judges to spell out those circumstances, it

gives appellate courts something concrete to review and provides the common law the opportunity to define the kinds of outrageous conduct that *should* be punished more harshly.

Because this opinion attempts to formulate a common law standard by drawing inferences from analogous legislative activity, Justice Mosk brands it "judicial lawmaking." (Conc. opn. of Mosk, J., *ante*, at p. 68, 993 P.2d at p. 395.) The language is unfortunate because it betrays a misconception of the responsibility of judges in the common law tradition. When exercising common law powers, all judges "make law," for the techniques of the common law involve reaching beyond positive law for a standard to guide the creation of a new legal rule or to supplement an old one. The real question is not whether judges "make law," it is whether they respect the boundaries imposed on their discretion by precedent and statute, and by constitutional text, design and tradition. It is arrogance, carelessness, and a lack of candor that constitute impermissible judicial practice, not creativity.

As noted, the Legislature has expressly authorized trial courts to grant new trials when damages are "excessive." The standard proposed here would provide trial courts much needed guidance as to the meaning of that word, removing a specter of arbitrariness that hovers over punitive damage awards without, in most cases, substantively affecting the result. Here, defendant based its new trial motion in part on excessive punitive damages. With respect to this issue, I would hold that, in the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three,

and then only in the most egregious circumstances clearly evident in the record. By this standard, the punitive damages awarded in this case were excessive, and therefore the new trial order was proper.

CHIN, J., concurs.

APPENDIX B

APPENDIX "B"

SUPREME COURT
FILED
May 10, 2000
Fredrick K. Ohlrich Clerk
Deputy

Second Appellate District, Division Seven,
No. B090259
S 059064

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

Jeffrey LANE et al., Appellants,
v.
HUGHES AIRCRAFT COMPANY, Respondent

(Filed May 10, 2000)

Petition for rehearing DENIED.

Mosk, J. is of the opinion the petition should be granted.

Opinion Modified.

George
Chief Justice

APPENDIX C

APPENDIX "C"

ORIGINAL FILED
December 15, 1994
Los Angeles Superior Court

Superior Court, Los Angeles County, California

JEFFREY LANE and DAVID VILLALPANDO,
Plaintiffs,
v.
HUGHES AIRCRAFT COMPANY, INC.,
Defendant.
No. BC 075 519
(Dec. 15, 1994)

Ian Herzog and Amy Ardell, appeared on behalf of plaintiffs.

Dennis Vaughn, Paul, Hastings, Janofsky & Walker, and James S. Bryan, Santa Monica appeared on behalf of defendant Hughes.

ORDER AND SPECIFICATION OF REASONS FOR GRANTING A JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE GRANTING A NEW TRIAL ON THE LIABILITY, DAMAGE, AND PUNITIVE DAMAGES

MACKEY, Judge.

Hughes motion for judgment notwithstanding the verdict pursuant to Code of Civil Procedure

section 629, and motion for a new trial pursuant to Code of Civil Procedure section 657 came on regularly December 15, 1994, in Department 21 of the above-entitled court, before the Honorable Malcolm H. Mackey, Judge presiding. Ian Herzog and Amy Ardell appeared on behalf of plaintiffs. Dennis Vaughn of Paul, Hastings, Janofsky & Walker, and James S. Bryan appeared on behalf of defendant Hughes. The matters were argued by counsel and stood submitted for decision on December 15, 1994. The court now issues its Order and Specification of Reasons as provided herein.

ORDER

Hughes' motion for judgment notwithstanding the verdict pursuant to Code of Civil Procedure section 629 is granted. Hughes' motion for a new trial pursuant to Code of Civil Procedure section 657 is granted, on the grounds of excessive damages and insufficiency of the evidence to justify the verdict and decision, error in law and misconduct of counsel. The court, after weighing the evidence, is convinced from the entire record, including reasonable inferences therefrom, that the jury and court should have reached a different verdict and decision. And in the alternative, a new trial is granted on all issues relating to Lane, Villalpando and Hughes.

On October 18, 1994, the jury awarded Lane $295,000 for wages to his date of termination, $2.3 million for loss of wages and work-related benefits, and found that Lane sustained emotional distress in the amount of $3.5 million, plus $40 million for punitive damages. Jurors on October 18 found that

Villalpando lost wages and work-related benefits and gave him $125 for wages to the date of termination, and $1.3 million for the future loss of wages and work-related benefits, and found Villalpando experienced mental and emotional distress and awarded him $2 million for that suffering. In addition, they awarded him $40 million punitive damages. The panel found that Hughes breached the implied agreement of acting in good faith and dealing fairly, discriminated against Lane because of his race, and retaliated against him because of his discrimination complaints. In addition, jurors found that Lane proved by clear and convincing evidence that Hughes acted with malice, oppression, fraud or despicable conduct, the threshold for the punitive damages phase. Jurors on October 4 also found there was an employment agreement between Villalpando and Hughes, that as part of that agreement, Hughes only could fire Villalpando for good cause and that Hughes forced Villalpando to quit, breaching the employment contract.

The panel also found that Hughes breached the implied agreement of acting in good faith and dealing fairly, retaliated against Villalpando because he complained about race discrimination against Lane and was forced to quit because of those complaints. In addition, jurors found that Villalpando proved by clear and convincing evidence that Hughes acted with malice, oppression, fraud or despicable conduct, the threshold for the punitive damages phase.

The court finds the following facts and that under the facts there is no substantial evidence for Lane's

discrimination or retaliation claims.

Mr. Villalpando first states that his management asked him to document unsatisfactory job performance by a black employee. He alleges that he determined that the employee's performance was not unsatisfactory, and that he was thereafter harassed by management. The facts, however, are not as portrayed by Mr. Villalpando.

Mr. Villalpando was employed by the Systems Operations Laboratories within Hughes Space and Communications Company. That organization performs final integration and testing of satellites designed and manufactured by the company. Mr. Villalpando worked as a section head, overseeing a group of engineers. One of those employees was Jeffrey Lane. In May 1991, Mr. Lane was reassigned from the program on which he was working. Dissatisfied with this action, Mr. Lane filed a complaint of race discrimination under the company's internal employee complaint procedure in 1991. The investigation of his case by the Human Resources department determined that there had been no unlawful discrimination against Mr. Lane.

Mr. Lane was scheduled for a promotion to senior project engineer in 1991. In the fall of that year, Gavien Miyata, the assistant manager of Systems Operations, heard that Mr. Lane was not performing well in his current assignment. He asked Mr. Villalpando, as Mr. Lane's immediate supervisor, to investigate whether that information was correct. Contrary to Mr. Villalpando's claim, Mr. Miyata did not instruct him to document unsatisfactory performance by Mr. Lane, but simply asked for Mr. Villalpando's assessment of Mr. Lane's work. See

Exhibit 57 attached.

Mr. Bradley and Mr. Phillips told Villalpando that Mr. Lane's performance had been substandard. Mr. Bradley and Mr. Phillips said they would not recommend a promotion for Lane based on his performance in managing the test procedures. Mr. Villalpando reported his findings to Hal Solomon, his laboratory manager, and Mr. Miyata. He told them that based on his conversations with Mr. Bradley and Mr. Phillips, he did not feel that Lane should be promoted. Mr. Villalpando stated Lane needed more supervision than a senior project engineer should require. He said that Mr. Lane was not performing as he had in the past but instead was feeling sorry for himself and not putting forth the necessary efforts. Messrs. Miyata and Solomon made it clear that the decision was Mr. Villalpando's to make. Mr. Villalpando reiterated that Mr. Lane should not receive the promotion. On the basis of Mr. Villalpando's recommendation, Mr. Solomon did not go forward with Mr. Lane's promotion.

Mr. Villalpando told Mr. Mohler that Mr. Lane should not be promoted. Mr. Villalpando alleges the System Operation management harassed him for refusing to document inadequate performance by a black employee. Mr. Villalpando's claim is based on a false premise in that Mr. Miyata merely asked Mr. Villalpando to look into how Mr. Lane was performing on his new assignment. It was Mr. Villalpando who reported that Mr. Lane was not performing to his expectations. It was Mr. Villalpando who recommended, on the basis of his findings, that Mr. Lane not receive a promotion.

Mr. Villalpando told no less than six persons--Mr.

Phillips, Mr. Miyata, Mr. Solomon, Mr. McFarlane, Mr. Mohler, and Mr. Short--that Mr. Lane's performance had declined, and he did not deserve a promotion for that reason. Mr. Villalpando alleges that management harassed him following his purported refusal to comply with an unlawful request.

The court finds that management made no improper demands upon Mr. Villalpando nor did he refuse to perform the task requested of him.

In the fall of 1991, reorganization in Systems Operation required the merger of Mr. Villalpando's section into a single department. Mr. McFarlane, the head of the other section, was chosen to be acting department manager. Mr. McFarlane was selected on the basis of his experience with the HS 601 satellite and his technical ability. Mr. Villalpando had worked primarily on government programs which were rapidly declining in number. The court finds that McFarlane had worked well with his customers and had good leadership skills, having assembled a well-respected team. After tentatively deciding to appoint Mr. McFarlane, Mr. Solomon polled the very technical staff members of both sections; they overwhelmingly favored Mr. McFarlane over Mr. Villalpando as their manager.

Although Villalpando was disappointed at not receiving the promotion, his superiors tried to find other opportunities for him. Mr. Villalpando later told Mr. Mohler that Mr. McFarlane's selection was all right with him, but management now needed to find him another job. Mr. Villalpando turned down a variety of positions offered to him.

In February of 1992, when Mr. Miyata met with

Villalpando, he discovered he was still angry about not receiving the department manager position and would not state what type of position he wanted. Shortly thereafter, Mr. Villalpando went out on medical leave.

At the beginning of his medical leave, Mr. Villalpando telephoned the office of Steven Dorfman, President of Space and Communications Company, and asked to meet with him. He later sent a letter to Mr. Dorfman stating that he wanted to speak with Mr. Dorfman about "group-wide racial discrimination ... [not] an isolated instance." Based upon these charges, a meeting was scheduled with Mr. Dorfman. (See correspondence attached, Exhibit B.)

The facts showed that he had no information to offer of an alleged pattern of discrimination. Therefore, Mr. Villalpando's claim that management was unwilling to meet with him is totally without foundation and this was an attempt to inject racial discrimination in the case.

The court finds that Mr. Miyata did not direct him to document poor performance by Jeffrey Lane--he asked Mr. Villalpando to find out how Mr. Lane was doing on his assignment. Mr. Villalpando did not conclude that Mr. Lane's performance was adequate--he told at least six people Mr. Lane was not performing well, recommended against his promotion, and recommended that he not be appointed to a section head position.

The court finds that management did not harass Villalpando. Another employee, McFarlane, was appointed department manager for sound business reasons. Management did not refuse to meet with

Villalpando. He had numerous opportunities to discuss his concerns, including a meeting with two senior executives.

The court also finds no unlawful retaliation occurred.

A. JNOV should be granted on Lane's race discrimination claim.

Plaintiff has not shown that the unfairness he experienced was due to his minority status.

Lane has not shown that race or discrimination was the real reason for his failure to be promoted. Plaintiff has not proven that the reason articulated by Hughes was a pretext and the actual reason was discrimination. Even if we are to assume that Lane's failure to be promoted was unfair, that would not establish discrimination, and the failure of Hughes to promote him to Senior Project Engineer, and there is no evidence of unfairness.

This is plaintiff's version of the facts:

• Villalpando recommended Lane for promotion in March 1991; the promotion was approved by Solomon in June 1991.

• Later that year, Villalpando was asked by Miyata to further review Lane's performance by checking with his most recent supervisors.

• Villalpando spoke to James Bradley and William Phillips. Phillips evaluated Lane's performance as consistent with Hughes' standards; Bradley evaluated Lane's performance as below Hughes' standards.

• Villalpando reported this information to Miyata and Solomon. Miyata told Villalpando, in light of

these two appraisals, "show you've got what it takes to be a department manager" by not recommending Lane for the promotion.

• Villalpando reported to Lane that he was being told not to give him a recommendation. Lane and Villalpando, despite their own conclusion that management's "orders" were because of Lane's race, agreed that Villalpando should say whatever management wanted, so as to protect his own career. All Lane requested was that Villalpando support him when Lane filed his already- planned lawsuit. Neither Lane nor Villalpando reported management's "orders" to the HR representative investigating Lane's prior complaint of discrimination.

• In accordance with their agreement, in the fall of 1991, Villalpando did not include Lane on the list of people to be promoted, which killed Lane's chances of promotion.

Assuming this entire version to be true, there is not a shred of evidence that Lane's race was in any way involved in any decision. Miyata's "orders" to Villalpando not to recommend Lane came only after Miyata heard (accurately, from Villalpando) that Lane's functional supervisors gave him lukewarm and negative evaluations, respectively. The only logical inference from Miyata's instruction to Villalpando to show his strength as a supervisor is that a supervisor should not promote a candidate with poor evaluations. Nor was there any evidence that the evaluations of Bradley or Phillips were in any way connected to race.

The evidence does not demonstrate that Hughes' actions were unfair, for failure to promote an

employee with negative recommendations cannot be considered unfair.

This court finds that Lane and Villalpando were working together. Lane and Villalpando conspired to subvert the internal system, that Hughes had to protect against, discrimination. Both Lane and Villalpando kept quiet, deciding to place their already-planned lawsuit in the best light, rather than trying to achieve the promotion through internal procedures.

Lane did not produce any evidence showing pretext.

1. There was no direct evidence by Lane's supervisors involved in Lane's employment at Hughes and there were no racial remarks other than those implied by Lane.

2. Lane did not present any true statistical evidence to compare the racial composition of the employees qualified to be promoted with the racial composition actually promoted. Rather, plaintiff presented antidotal information to influence the jury. Such statistics without offering any evidence to show that these other employees were qualified to be in management do not show pretext.

3. The only comparative evidence does not show pretext. Lane was paid the same amount as those with whom he was classified (see Exhibit 50). He was not classified as an operations manager because it would be inaccurate to equate what he did on Ku Band program with the tasks of operations managers and spacecraft managers. James Bradley and Lance Mohler testified, with one exception, all of the spacecraft managers and operations managers in Bradley's lab were responsible for a complete

spacecraft from start to finish. Ordinarily, at least 25 employees worked on a spacecraft under the spacecraft manager and the operations manager. Lane, on the other hand, was the most senior person in only one of four units and supervised only a few employees.

The title operations manager, as used in Lance Mohler's lab, was an unofficial, functional title. It referred simply to whoever was the most senior person for any project on which any work was being done in the lab. It is undisputed that Lane did not have the same level of responsibility as the operations managers or spacecraft managers in Bradley's lab who were responsible for programs of far greater dollar value and using the services of far more employees.

The court finds there is no basis for Lane's claim that he should have been paid the same as those operations managers and there is no basis for finding that the failure to pay him the same or classify him the same as those operations managers was a pretext for racial discrimination.

Lane never testified that that removal was racially discriminatory. Villalpando admits that when he was told the reasons for Lane's removal from the Ku Bank, he felt that the reasons "made sense."

Lane's additional argument that Hughes did not want a black person holding such a high level position is contradicted by undisputed evidence. Steele testified, Walt Atkins, a black employee, was at that time a program manager in the program office for a program larger than Ku Band.

The court finds Lane was provided with job

opportunities, but he ignored them.

In the job offer with Phillips, the facts do not permit an inference that this was a pretext of discrimination. Lane was offered a job with Phillips only after he declined to pursue the spacecraft manager position. Second, Lane was never asked to leave Phillips' department and was never taken off the assignment with Phillips. Instead, Lane walked off the job.

The evidence does not support Lane's reasoning that he failed to be promoted to senior project engineer in the fall of 1991. The comparative evidence showed no discrimination in that seven other employees in Mohler's lab, not including Lane, were scheduled for promotion early in 1991, but ultimately were not promoted. Five of these employees were white and two were Asian. Ron Williams, a black employee, did get a promotion to senior project engineer at the same time that Lane and others did not. It was Lane's subjective belief that he was discriminated against, but the objective facts and the evidence is to the contrary.

B. JNOV should be granted as to Lane's retaliation claim.

Again, Lane failed to show substantial evidence that the adverse employment action taken by Hughes was pretextual and that the reason for the action was to retaliate against Lane for bringing the racial discrimination claim. The alleged retaliatory action consisted in the denial of a promotion in the fall of 1991. The same reasons infra that have failed to produce substantial evidence of his burden of

proving that Hughes' action was racially based applies, that Lane failed to meet his burden to prove that this was retaliatory.

C. JNOV should be granted as to Villalpando's retaliation claim.

Villalpando has not shown

(1) that he is engaged in some protected activity;

(2) that the employer subjected him to some adverse employment action; and

(3) there is no causal link between the protected activity and the alleged retaliatory action.

Villalpando has failed to establish a case because he failed to demonstrate that his support for Lane reached the level of engaging in a "protected activity." And he failed to meet his legal burden of proving pretext.

1. Although Villalpando supported Lane in a general sense, he never voiced any support for Lane that would give Hughes reason to retaliate. His evidence of "support" with respect to Lane's May 1991 complaint consists only of the following: He accompanied Lane on his first visit to Human Resources; and he briefly discussed the substance of Lane's claim with the investigator, offering documents showing that he previously recommended Lane for promotion.

Villalpando never testified that he told the investigator that Lane's race discrimination claim was valid. He never told anyone in management that Lane's complaint had merit, or that Lane was discriminated against, or that Hughes needed to take remedial action. What he did tell management is

that he felt Lane's performance was inadequate and he should not be promoted. There is no substantial evidence that he was forced to write a bad review despite his protestation to the contrary. Therefore, Villalpando did not provide any kind of support for Lane that rises to the level of "engaging in a protected activity."

Villalpando testified that they agreed Villalpando would not support Lane and Villalpando would in effect go along with whatever management wanted to do about Lane's promotion.

Villalpando introduced no evidence that the only adverse employment decision involving him was retaliatory and did not prove pretext.

The evidence shows that Villalpando was never retaliated against for any support he may have provided Lane.

In mid-1990, Villalpando became Lane's supervisor and asked Solomon why Lane, as an operations manager, was not in Bradley's lab and told Solomon he thought Lane's exclusion from the lab was due to his race. Solomon admitted Villalpando asked the question as to why Lane was not in Bradley's lab at least once, but denied any mention of race.

In March and April 1991, Villalpando made the recommendation of Lane for promotion and a special merit increase. In May 1991, Lane filed his internal complaint of discrimination. In mid-June 1991, he met with Goland about Lane's complaint.

No adverse action was taken against Villalpando because of these action. To the contrary, in January or February 1991, Solomon gave Villalpando the highest possible rating ("E") to his formal appraisal,

and Villalpando received a good raise (see Trial Exhibit 56). On June 12, 1991, Solomon approved the promotion for Lane that Villalpando had initially recommended (see Exhibit 51). In August 1991, after these events relating to Lane took place, Villalpando was promoted from project engineer to senior project engineer--from a level 6 to a level 5.

It was the fact that McFarlane received a promotion instead of Villalpando that caused Villalpando's animosity toward Hughes.

D. Villalpando did not carry his legal burden of proving he was constructively discharged.

Villalpando does not meet the objective standard for constructive discharge for his failure to be promoted did not reach the required level of intolerability. The working conditions were not so intolerable that at the time of his resignation Hughes would realize Villalpando would be compelled to resign.

Villalpando's claim that failure to promote him for being an alleged victim of race discrimination does not change this result.

Failure to promote would be an isolated discriminatory act and is not sufficient to support constructive discharge. Also, Villalpando did not give Hughes the opportunity to remedy the alleged intolerability, so there is not substantial evidence to support the jurors' findings on this issue.

E. JNOV granted for the breach of the implied covenant claim.

Lane was never terminated and Villalpando's claim of constructive discharge is without merit.

F. JNOV on damages.

The court grants judgment NOV as to front pay as a matter of law because both plaintiffs rejected unconditional offers of reinstatement. Here, both Lane and Villalpando were offered unconditional offers of reinstatement which included their sought-after promotions. Both plaintiffs declined the offer and therefore the front pay damages are barred.

The unconditional offers included provisions that neither plaintiff would report to any former supervisor and special individuals would be responsible to ensure no retaliation occurred.

G. JNOV as to punitive damages.

The court finds that JNOV is granted on punitive damages as to both plaintiffs because there was no clear and convincing evidence of malice. The evidence showed none of the vicious racist remarks and epithets that characterize most cases in which punitive damages are awarded. There was no competent statistical evidence of discrimination. Absent statistical proof, there is no indication that the wrongs the jury found had been committed against Lane and Villalpando happened to anyone else, or were representative of any policy, pattern, or practice of Hughes. Rather, the evidence showed

that Lane had received promotions and substantial salary increases despite the self-imposed restrictions on the type of work he would accept. The evidence showed the potential promotion in 1991 turned on his own supporter's evaluation, and his supporter refused to recommend him. The evidence showed a white employee with the same credentials and experience as Lane was at the exact same level.

The evidence as to Villalpando showed he received numerous raises and promotions right up to the time he left on medical leave and then resigned to take a better job. He continued to speak poorly of Lane to others not involved in the initial decision to promote Lane. Nor did he ever complain to anyone that he felt his own employment situation was intolerable.

The court finds that the evidence does not meet the clear and convincing standard necessary to award punitive damages. There is no showing of egregious conduct or willfulness or malice on the part of Hughes. The malice, if any, is not clear and convincing.

Plaintiffs also conspired to subvert Hughes internal safeguards against discrimination by concealing facts from the Human Resources department and instead planned a lawsuit.

IN THE ALTERNATIVE, THE COURT GRANTS A NEW TRIAL AS TO LIABILITY, DAMAGES AND PUNITIVE DAMAGES

1. Standards where damages are excessive.

After weighing the evidence the court is

convinced from the entire record, including reasonable inferences therefrom, that the damages awarded were excessive and disproportionate, and a new trial on all issues, not mere remittitur, is the only appropriate remedy.

2. There is insufficient evidence to support the verdict.

As to Villalpando, there are (1) the absence of significant acts on his part protesting the alleged discrimination against Lane; (2) the absence of any connection between his actions and the decision to prefer McFarlane for the promotion.

As to Lane, (1) neither of the two supervisors who evaluated his performance prior to the potential promotion was shown to be biased, (2) he had received recent promotions and pay increases, and (3) whites recommended and approved for promotion in 1991 also did not ultimately receive the promotion.

3. The economic damages are excessive and contrary to the evidence.

(1) Lane's evidence of economic damages.

The sole evidence introduced in support of Lane's economic damages was the testimony of his economic expert, who concluded Lane was entitled to $247,000 in back pay and $2.1 million in front pay. These assumptions are not supported by the evidence. First, this assumes that his salary would be the same as employees classified as an operation

manager. Lane was never classified as an operations manager and there is no evidence that he should have been even if he received a promotion to senior project engineer in 1991. Second, Lane assumes that had he remained at Hughes, he would have continually advanced through department manager, division manager, and up to laboratory manager. The evidence presented at the trial demonstrated that such advancement was unlikely for two reasons. First, the self-imposed restrictions on the type of work Lane was willing to do would prevent him from moving into management positions. Second, the evidence showed that due to the setbacks in the aerospace industry many managers actually had their responsibilities decreased. Third, Lane claims that although he is only 39 years old he will never be able to work another day in his life. The evidence shows that he works as a dispatcher in his wife's courier service three days per week and keeps track of the billing and other financial matters. Moreover, he spends four to five hours a week going door to door as a Jehovah's Witness. There was uncontradicted evidence that someone in Lane's position could have found a comparable job to that which he held within Hughes within 6 to 18 months whether limited to the aerospace industry or not.

At a minimum, his future earnings would be cut in half where the average annual compensation for dispatchers in Southern California is approximately $28,000. The court does not find that Lane would be unable to hold a job because of his emotional state. Also, his son Joshua mentioned that the courier business was his dad's business. Further, in the court's observation of Lane for the last two months,

he appears mentally and physically alert, he does not appear to be distressed or have any physical or mental problems.

(2) Villalpando's evidence of economic damages.

Consisted solely of his economic expert, and none of the assumptions of the expert were supported by the evidence.

First, Villalpando assumed he would have received a pay increase in November 1991 if he received the promotion to acting manager of the RF department instead of McFarlane. The evidence showed that McFarlane did not receive a pay increase upon getting the promotion. Second, Villalpando assumed he would have continued to receive promotions up to the division manager level. The evidence at trial showed that the position no longer existed at Hughes. Further, managers above Villalpando had their responsibilities decreased because of the conditions in industry. Thus, it was not appropriate for Villalpando's expert to assume Villalpando would reach the division manager level. Third, Villalpando assumed he would never be in management at the aerospace corporation. This assumption is based entirely on Villalpando's self-serving testimony that he would not accept a management position because of what had happened at Hughes.

There was absolutely no testimony from any expert that Villalpando was psychologically incapable of supervising or managing others. Therefore, the court finds that Villalpando is not entitled to $1.3 million in pay simply because he

refuses to take on supervisory responsibilities. Therefore, eliminating the insupportable assumptions made by Villalpando's expert reduces Villalpando's economic damages to a minimal amount of back pay and no front pay.

Front pay is inappropriate for the additional reason that plaintiffs rejected the unconditional offers of reinstatement.

Hughes made both Lane and Villalpando an unconditional offer of reinstatement, which included their sought-after promotions. Both plaintiffs declined that offer.

Neither front pay nor back pay can be awarded any period of time after a quit, absent a constructive discharge.

The emotional distress damages are excessive and contrary to the evidence.

It consisted only of self-serving descriptions by plaintiffs and members of the families of bad feelings, which do not even require continuing psychological counseling.

(1) Lane's evidence of emotional distress.

Lane's entire evidence of emotional distress consisted of testimony by his family and a psychiatrist Lane saw for a total of no more than a few hours. There was no evidence that Lane's emotional state was so badly injured that he required any regular counseling.

His family testified only he was less energetic than he used to be and he felt bad because he could not send his children to private school. There was no evidence that the Lane family went into debt or had

to sell anything of value to get by.

The testimony of the psychiatrist, Dr. Friedman, did not offer any medical evidence of emotional distress. There was no need for regular counseling. The only ongoing treatment is an anti-depressant drug Lane takes regularly. The evidence offered at trial suggests that Lane's emotional state is quite normal. Every doctor who interviewed Lane found him to be alert, with good short- and long-term memory, and not severely depressed. Lane scored 132 on an IQ test, demonstrating that he suffered no cognitive impairment, and he could handle the stress of taking tests.

(2) Villalpando's evidence of emotional distress.

Came only from his own and his wife's testimony. There was no medical, psychiatric or psychological or other expert testimony in support of the emotional distress claim. Villalpando testified he cried when he didn't get the promotion. He testified his heart would pound when he didn't get the promotion.

Dr. Kissel testified he found nothing wrong with Villalpando and Villalpando exercised regularly.

Villalpando's wife's testimony consisted only of her repeated statements that Villalpando was not the same man she married. She stated he was less communicative, less trusting, and less enthusiastic than he was before. There was no evidence that he had begun drinking or had become abusively hostile.

Villalpando offered no evidence that he was receiving medical attention, psychotherapy, counsel-

ing or other assistance in dealing with his alleged emotional distress. There was no testimony that he regularly took medication or that he needs further treatment of any kind. There was no testimony of any physical injury resulting from the emotional distress.

Punitive Damages

Punitive damages award is excessive and was clearly motivated by passion and prejudice. The award does not bear a reasonable relationship to the nature of defendant's action and the extent of plaintiffs' injuries.

The punitive damages award does not fit the offense. This was not a failure to hire or discharge case in which persons are deprived of a livelihood, but the alleged wrongdoing was the failure to give each plaintiff a promotion he felt he deserved.

The following facts are critical to measure the severity of Hughes' conduct:

1. Neither plaintiff was discharged: Lane remains a Hughes employee to this day, on medical leave of absence; Villalpando voluntarily left Hughes (for the second time) to take a better paying position in another aerospace company in the same part of town.

2. Both plaintiffs received raises and promotions, as well as other employment opportunities within Hughes that they chose not to pursue.

3. Neither plaintiff has been the victim of any racist slurs or epithets.

4. There is no statistical evidence showing any pattern of discrimination at Hughes.

5. A white employee hired at the same time as Lane and with the same credentials and experience as Lane was earning exactly the same salary as lane in 1990 and was at the same job level.

6. Four employees removed from projects in Mohler's lab in the same period that Lane was removed from the Ku Band project were white or Hispanic.

7. Seven employees scheduled for promotion in 1991 but who were not promoted were white (5) and Asian (2).

8. A black employee received a promotion to senior project engineer in 1991 at the same time that the non-black employees were not promoted.

9. During a time when thousands at Hughes were laid off, Lane and Villalpando were not only retained, but promoted and given salary increases.

10. Lane had announced plans to leave Hughes due to religious reasons, but management found work fitting within his unique requirements and asked him to stay.

The punitive damages award is grossly disproportionate to plaintiffs' injury and the amount of actual damages awarded.

The court determines by inference from the large amount of punitive damages and excessive emotional damages that passion, sympathy, animosity or prejudices crept into the jury's verdict and affected its decision on liability as well as damages, and a new trial on all issues is required.

A new trial is appropriate because prejudicial evidence of acts prior to 1991 was improperly admitted.

The only acts of discrimination or retaliation

toward Lane for which Hughes could be liable were those occurring no earlier than one year prior to the filing of Lane's first charge of discrimination. Cal.Govt.Code s 12960.

The court attempted to limit the plaintiff's counsel to 1989, but he was successful in bringing before the jury what he considered some 14 years of discrimination to the plaintiff Lane. See pages 4, 5, 8, 9, 10 and 75, 76, 79, 80 and 81 of plaintiff's argument. The court finds that admitting this evidence was improper and under 352 it should have been excluded. As is apparent from the verdict, such evidence inflamed the jury and should not have been admitted.

Plaintiff's counsel argues strenuously that Lane was an individual who suffered discrimination for 14 years and was allowed to form the impression that compensatory and punitive damages should be based on several alleged incidents of discrimination. This was error.

Also, the court improperly admitted the testimony of Ron Williams, a fellow black engineer at Hughes. This evidence should have been excluded under 1101(b) of the Evidence Code in that this was a single prior act, or in any event excluded under 352, as the prejudicial effect far outweighed the probative value and inflamed this mostly minority jury.

Further, counsel in his argument constantly referred to Ron Williams, at pages 18, 19, 50, 51, 76 and 86, in the attached closing arguments of counsel.

Also, it was improper to admit the letter Villalpando sent to Dorfman, the president of Hughes, which was a self-serving attempt to inject racism at a high level. These documents (see

attached letters) should have been excluded under 352, as the prejudicial effect outweighed the probative. These letters were irrelevant and immaterial as to whether there was racism at Hughes and was a clever maneuver to increase punitive damages.

IRREGULARITY OF PROCEEDINGS, MISCONDUCT OF COUNSEL

A. Arguments of counsel that are unsupported by facts in evidence are misconduct which justify a new trial.

Irregularity of proceedings is a statutory ground for a new trial. CCP s 657. Misconduct of counsel is such an irregularity. There is misconduct when an attorney makes an improper argument by urging facts not justified by the record or suggesting the jury may resort to speculation. Although counsel may indulge in all fair arguments in favor of his case, he may not assume facts not in evidence or invite the jury to rely on unsupported inferences. Such conduct justifies a new trial. See the closing argument attached hereto as Court Exhibit A. The court has highlighted 37 pages out of 100 of inflammatory remarks and "buzz words" to inflame the jury. That is why plaintiff's counsel's charge of blatant racism was so effective with this jury.

Counsel continually attacked Sue Goland, the head of the Human Resources department at Hughes who investigated Lane's claim, and made remarks about the KKK to her which had no part in this case. Witness Goland was offended by these remarks.

Counsel used words as "having to beg for promotion" ... "the kind of invidious discrimination (see page 16) that black versus non-white has to do to get some performance rating."

Counsel referred to Ron Williams, who was a black engineer, at pages 18, 19, 49, 50, 51, 56 and 86, in his closing argument. As indicated at pages 19 and 86, "the only black let in the front door of the operations managers was told to sit down and shut up and just be an observer." At page 49, Ron Williams said he had been discriminated against. He was put on a "soft layoff", but whites were not put on a "soft layoff list." This evidence should have been excluded under 1101(b), a single prior act. It is highly prejudicial and outweighs the probative value.

Improper injection of Al Campanas, a black manager who was discharged by the L.A. Dodgers. See pages 20 and 21.

> "And I asked Mr. Solomon some questions about that. I read his deposition. I get the most startling Neanderthal answer I think you could get. This is page 41 of his deposition. I put it up on the screen when he was on the witness stand."
>
> "Q. Were you dissatisfied with the situation at Hughes when you were involved with the affirmative action program at Sys Ops that blacks were appropriately represented?"
>
> "A. Let me answer a little bit differently. They were appropriately represented for their abilities."
>
> "... Appropriately represented for their abilities. Then I pop up with the remark,"

"Q. Have you ever heard of Al Campanas?"

"Do you all remember who Al Campanas was? Al Campanas was the fellow at the Dodgers who somewhere around this time got into heat as to why there were no black managers. He says because something about the best of their abilities. I forget what the phrase was, making a similar slur like this for which he got himself, and justifiably so, summarily discharged from the Dodgers, the home and birth place of Jackie Robinson. If there is anybody who understands about ethnicity and what is correct, it's the Dodgers. "They were appropriately represented for their abilities." What does that tell you about the psyche and psychology and the thinking of this group that runs this laboratory, where he could say something like that? This is logical. Now, he would never say overtly, I am a racist. He probably couldn't even subconsciously admit it to himself, but that is a racial slur."

This was a highly prejudicial example to inflame this minority jury.

Page 36, line 24, they told (Villalpando) "Miyata was pissed off at Villalpando helping Jeffrey Lane."

At page 81, "That's why people in sweat shops down here like to hire illegal immigrants, they get work done cheap." This was used to inflame the four Hispanic jurors and the six black jurors.

At page 71, "What they did was disgusting, despicable, vile and rotten." Counsel consistently

took statements out of context and led Lane. See copy of reporter's transcript of September 14 and 16. "Oh, that's enough money for you as a black man but not if you were a white man." This statement was never said but was implied and was taken out of context and was highly inflammable.

Counsel also cited Martin Luther King and Thomas Jefferson and cried at the end of his argument. Also, Lane and Villalpando cried and broke down on the witness stand, stating that they had never cried before.

It was also error to allow Dr. Klein, who testified over the objection of counsel, that his chiropractor, a black woman, told Dr. Klein that "plaintiff would never be able to work again." This is hearsay and defendant's objection to this should have been sustained.

It was also error not to instruct the jury that attorney fees were not included in the award.

Counsel improperly referred to money in the liability phase of the trial. The first phase of the trial was bifurcated and the only issue was liability. "And when we get to a verdict it's a language called dollars, that what it's about. It's a language they understand and that's the language I ultimately want you to communicate to them in. Because to communicate to them in any other way would basically mean business as usual for them, that what they did to Jeffrey Lane was meaningless." See final argument of plaintiff, 100.

In conclusion, the court found that defendant witnesses Goland, Miyata, McFarlane were not liars, cheats or conspirators as indicated by the plaintiff, but were sincere businessmen and engineers. They

were not racist or biased and went out of their way to assist Lane and Villalpando. Lane and Villalpando attempted and did conspire to obtain a large sum of money upon subjective discrimination, and they had little, if any, injury and were not motivated in the best interests of Hughes, but for their own financial gain.

CONCLUSION

The overall verdicts rendered by the jury provide for total recovery of $89,525 which does not include a requested $1.5 million attorney fees. This award is so disproportionate to the injuries, damages and conduct, and so unsupported by the evidence it shocks the conscience of this court to the point the court cannot countenance such a result and feels compelled, despite its respect for the jury process, to grant a new trial on all issues relating to Lane and Villalpando versus Hughes and a judgment JNOV for the reasons stated herein.

It saddens the court to overturn the verdict, or in the alternative to grant a new trial. However, it is the court's duty, for if the jury system is to survive, runaway verdicts such as this have to be reversed.

In fine, whatever unfairness Lane and Villalpando subjectively felt, there was no substantial evidence or legal proof that what happened to them was because of Lane's race that Villalpando was retaliated against for engaging in a legally protected activity.

Dated: Dec. 15, 1994

Malcolm H. Mackey
Judge of the Superior Court

APPENDIX D

APPENDIX "D"

COURT OF APPEAL - SECOND DIST.
FILED
JAN 6, 1997
JOSEPH A. LANE, CLERK

(59 Cal.Rptr.2d 882; previously
published at 51 Cal.App.4th 1601)

Court of Appeal, Second District,
Division 7, California.

Jeffrey LANE et al., Plaintiffs and Appellants,
v.
HUGHES AIRCRAFT CO., Defendant and Respondent.
No. B090258
(Filed January 6, 1997)

As Modified on Denial
of Rehearing Feb. 4, 1997.

Ian Herzog, Evan D. Marshall and Amy Ardell, Santa Monica, for Plaintiffs and Appellants.

Paul, Hastings, Janofsky & Walker, Paul Grossman, Los Angeles, Dennis H. Vaughn, Santa Monica, and George W. Abele, Los Angeles, for Defendant and Respondent.

LILLIE, Presiding Justice.

Jeffrey Lane, an African American, and David Villalpando, his former supervisor, appeal from a

judgment notwithstanding the verdicts and an order alternatively granting a new trial following jury verdicts against plaintiffs' former employer, Hughes Aircraft Co. (Hughes). The jury had found that Hughes racially discriminated against Lane, and retaliated against Villalpando for his refusal to write a poor job evaluation of Lane. Plaintiffs also challenge certain evidentiary rulings excluding expert testimony and allowing, in the trial's punitive damages phase, testimony of Hughes' activities in support of minorities. In addition, plaintiffs contest a jury instruction limiting the period damages are recoverable, and denial of their motion to disqualify defense counsel.

STATEMENT OF FACTS

Hughes is a large aerospace corporation which employs about 50,000 people. In the 1980s and early 1990s, roughly half of its work consisted of classified, defense projects for the federal government, and the other half, nonclassified, commercial projects for private companies.

Hughes' Program Office administers contracts Hughes has with the federal government and with private companies. The Program Office also deals directly and has primary contact with Hughes' customers.

Hughes' Human Resources (HR) Department handles internal employee complaints. In 1987, attorney Susan Goland began working in the HR Department. Her duties included investigating race discrimination claims and defending Hughes against discrimination complaints filed with the federal Equal Employment

Opportunity Commission or the California Department of Fair Employment and Housing.

Plaintiffs Lane and Villalpando worked in Hughes' Space and Communications Division, which had between 5,000 and 5,500 employees. This division contained laboratories divided into departments, which in turn were divided into sections.

At Hughes, the management positions started at level 4B, and a section head was an introductory line management position. Spacecraft managers were generally level 4B employees, and operations (Ops) managers were generally ranked higher, at level 4A. The highest management position was at level 1. Laboratories managers were at level 2.

Employees were periodically evaluated, with a rating of 5 being the lowest performance level below Hughes standards, a rating of 1 being the highest performance level and a rating of 3 meeting Hughes standards.

In 1990 and 1991, Charles Lance Mohler was a level 2 laboratories manager in charge of about 500 employees in four laboratories in the Space and Communications Division, including the 4M Laboratory[1] where Lane and Villalpando worked. Mohler's supervisor was Mal Meredith. Directly under Mohler were assistant lab managers Gavien Miyata, ranked at level 2, and Howard Seeb. Assistant lab manager Hal Solomon reported to Seeb.

Of Mohler's over 50 managers level 4 and above, there were no black managers. None of Mohler's approximately 20 department managers were black; nor

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[1] The 4M Laboratory was also known as 4M2X.

were any of the 10 "technical heads," who were below department managers, black. No black department managers or technical heads were proposed for 1992.

A. Plaintiff Lane's Work History Before Villalpando Became His Immediate Supervisor

Lane first worked for Hughes in the summer of 1974 as an assistant engineer while majoring in physics as an undergraduate student at the University of Southern California. At the time, he was 19 years old. He returned to Hughes in 1977, when he completed almost all his course work to obtain a bachelor's degree.[2] At that time, Lane was an "MTS 1" test engineer, the lowest level 7 technical position.

In 1985, Lane tendered his resignation because the classified, military work he did conflicted with his religious beliefs. However, a manager whom Lane was under convinced Lane to do commercial work for Hughes. Lane then worked in the communication satellite field, performing engineering functions on satellites.

Lane's performance reviews in the 1980s were consistently good. Nevertheless, in 1986, having never before been promoted, Lane had to request a promotion from Robert Ward, his supervisor at the time. Lane received a one- step promotion in 1987, his tenth year at Hughes.

By 1987, Lane was a test director and a group head, positions which a Hughes organization chart indicated

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[2] Lane obtained his degree a few years later.

should be ranked at level 5. Even though Lane was ranked at no higher than a level 6, he was the highest ranked black employee in Ward's section.

When Lane received a promotion in 1987, he was assigned to the Inmarsat program. The Inmarsat was a communications satellite for ship-to-shore communications.

Lane assumed ever-increasing responsibilities on the Inmarsat, from test director to spacecraft manager in 1988. According to a Hughes chart, a spacecraft manager should be a level 4 position, but Lane was still ranked no higher than a level 6.

A performance appraisal from Ward dated December 9, 1988, and written by someone else, commended Lane as an "outstanding Inmarsat team leader" who "is competent, responsive and thorough in performing his tasks. Mr. Lane also possesses the qualities of a good manager.... He is respected by his fellow workers and makes a conscious effort to build team work and morale. [¶] I plan to train and groom Mr. Lane to assume the operations manager role on Inmarsat CM-4."

In early 1989, Lane became the Ops manager on Inmarsat CM-4. Lane asked for and Ward denied Lane a promotion. Consequently, Lane remained a level 6 employee.

Lane contacted the HR Department to complain about race discrimination, but an HR staff member named Mark said there was no discrimination.

Thereafter, on February 2, 1989, Lane wrote a memorandum to Robert Farmer, Lane's department manager at the time. Lane stated that in the middle of his eleventh annual performance appraisal, he felt "compelled to respond to a chronic under-evaluation of

my efforts.... [¶] ... However, in discussing this issue with my immediate supervisor, Mr. Ward appears unable and/or unwilling to objectively assess my job performance against my overall rating and put forth the necessary effort to rectify this disparity. Therefore, I appeal to the integrity of higher authority for a rational review of this matter."

Following the February 2, 1989 memorandum, Lane received a raise in two allotments.

Two months after the memorandum, Ward rated Lane lower than before. Instead of giving Lane a "2" performance rating, Ward rated Lane at a "3," merely meeting Hughes standards.

In 1989, Lane additionally worked on the "Consolidated Test Laboratories" or "CTL" program, and was the test director of the KU Band. CTL was a plan to consolidate testing for equipment returned from Space Shuttle flights in a single organization. The KU Band was the radar and communications system for the space shuttle. Mohler's staff was responsible for testing the deployed assembly of the KU Band, while other organizations handled manufacturing parts.

In performing his CTL and KU Band tasks, Lane worked under James Samis, a level 5 employee. As Samis was only supposed to be a temporary Ops manager for the CTL program, Samis groomed Lane to replace him.[3]

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[3] On direct examination for the defense, Samis did not deny grooming Lane to become the KU Band's Ops manager, but testified that he did not recall doing so.

In 1989, Samis wrote in Lane's performance evaluation that Lane "has taken on the KU Band test direction tasks in the last couple of months and has performed very well in the limited operations and time available in conjunction with his Inmar Sat duties."

Samis voluntarily left the CTL program in 1990. In preparation of his departure from the program, Samis recommended in writing that Lane "continue to be the responsible person from Division 4M for overseeing daily activities on D.A. testing"[4] and that Howard Seeb "be the contact point for all CTL issues at this time."

After Samis transferred from the CTL program, Lane was in charge of the KU Band project for Mohler's laboratory, and he remained the test director. Occasionally referred to as an Ops manager, Lane lacked the official job title.

Before Samis left the CTL program in 1990, he was briefly part of an Ops and spacecraft managers organization formed by Mohler that same year. Lane, however, was left out of the group.

B. Events Beginning in Spring 1990 When Villalpando Became Lane's Supervisor

In March or April 1990, Villalpando became acting "RF" Section Head under Solomon, who interviewed Villalpando for the position. As such, Villalpando became Lane's immediate supervisor. Solomon selected Villalpando over Lane because Solomon felt Villalpando

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[4] The phrase "D.A. testing" referred to deployed assembly.

had a stronger technical background than Lane and because Villalpando was cleared to work on commercial and classified spacecraft.

Villalpando, a level 5 employee, has a B.S. and an M.S. in electrical engineering.

Thinking it unusual for Lane to be a level 6 employee because he had the responsibilities of a level 4 Ops manager, Villalpando asked Lane why he was not a higher level than 6. Lane answered that it was because of his race. Villalpando then approached Solomon, who said he did not know why Lane was not in Mohler's organization for Ops and spacecraft managers, but that he would look into the matter.

About a month later and then about a month or so afterward, Villalpando approached Solomon again to find out why Lane was not in Mohler's group. Each time, Solomon responded that he was looking into the matter.

By around November 1990, Lane began to feel he was not wanted on the KU Band program because he was excluded from key meetings. Some of these meetings were held for Mohler's organization created that same year.

In the end of 1990 or beginning of 1991, when raises and promotion requests were made, Villalpando ranked Lane as the first on his list requesting promotions because Villalpando considered Lane one of his "top notch" employees. Working directly with Lane, Villalpando found him to be a superior performer who was well-liked. Mohler, under whom Lane had worked, likewise considered Lane a valued employee who did a good job.

Villalpando also recommended another black

employee in his section, Rick Story, for promotion. Story received the promotion.

Solomon agreed with Villalpando's recommendation to promote Lane. However, nothing happened.

In February 1991, on behalf of Mohler's laboratory, Lane led negotiations with the Program Office for the maintenance and repair of the KU Band project. Villalpando assisted Lane. Throughout the negotiations, Lane and Villalpando followed Mohler's advice. Mohler was not dissatisfied with Lane's and Villalpando's work in this area.

Around this time, Villalpando gave Lane an award for his superior performance on the KU Band. The award was issued by the Program Office, and signed by then- Program Manager Richard Johnson.

Johnson was later replaced by his assistant program manager, David Steele, in April 1991.

Meanwhile, a dispute arose between the Program Office and Mohler's staff negotiating for the CTL. The customer wanted less resources used than what Lane thought necessary to do the job satisfactorily.

While negotiations were ongoing, the Program Office told Mohler that it wanted to negotiate with someone possessing a higher rank than Lane.

On April 23, Steele told Mohler that Lane needed to be replaced. By the end of April, Mohler took Lane off the KU Band.

Lane learned of his removal from his successor, level 3 Lab Manager Jan Sikola, who was previously Mohler's assistant on the original KU Band project. At some point in time, Meredith called Villalpando to explain that Sikola replaced Lane because Sikola was better qualified than Lane as a result of Sikola's year of experience on the

KU Band program.

In violation of Hughes' normal procedure for a removed employee to receive a transition plan, no such plan was made for Lane. Consequently, after Lane trained Sikola, he had nothing to do.

Sikola brought a level 4A assistant, Section Head Jack Collins, with him. Sophie Neberling, who worked in a laboratory run by Sikola, took over the CTL negotiations. Steele dealt with Neberling, and to some extent Collins and Sikola. Eventually, two level 4 employees replaced Sikola and Collins. None of Lane's replacements were black. One of Lane's successors was a level 4 employee without a bachelor's degree.

When Lane asked Mohler, Solomon and Seeb why he was pulled off the KU Band, all three responded it was not a performance issue. They told Lane that they had big plans for him and that he was a valued employee. None of them gave Lane a reason for his removal, although Mohler mentioned Steele.

Knowing it can be distressing for a displaced employee not to have a transition plan, Mohler expected Sikola to at the minimum assist in making a transition plan for Lane. However, Sikola did not do so, expressing concern to Mohler about Lane's and Villalpando's performance. Mohler relayed to Sikola his dissatisfaction with Sikola's failure to find a job for Lane, but did not document his displeasure.

Following Miyata's suggestion, Lane went to the HR Department, where he orally complained about race discrimination.

Later, on May 17, 1991, Lane brought Goland a written internal complaint after he understood that Goland would do nothing until she received a written

complaint. Before submitting the complaint, Lane expressed concern not to upset individuals who might retaliate against him, and requested Goland not contact his middle or lower management. After Goland agreed to investigate outside Lane's management, Lane submitted the complaint. In the complaint, Lane alleged that unlike non-black employees, it took him 10 years to receive his first promotion despite outstanding performance evaluations.

After Lane filed his complaint, he developed chronic fatigue. Lane went on a temporary leave as of May 22. While Lane was on leave, Meredith telephoned him on May 23, 24 or 25 to tell Lane to return to work.

On May 24, 1991, Meredith called Mohler to tell him the situation with Lane was critical, and that Mohler needed to find Lane a job right away. In response, Mohler asked Steele to write a letter.

In a letter dated May 29, 1991, Steele compared Sikola with Lane and Villalpando, and was critical of Lane. This was the first criticism that Villalpando knew regarding Lane.

After Mohler received Steele's letter, he told Miyata, Seeb and Solomon that Meredith wanted them to transition Lane immediately. Mohler assigned Solomon the task of getting Lane a job.

In early June 1991, Villalpando met with Goland and Solomon. During the meeting, Goland expressed regret that Meredith telephoned Lane at home because it would look bad in court, and "she started talking about firing Jeffrey for insubordination for refusing assignments...." Villalpando got the impression that Goland wanted him to document Lane's work

performance.[5] Miyata thought Goland discussed documentation in a general way.

Around the same time, Solomon was first advised of a possible problem with promoting Lane. The problem was that the promotions guidelines were made "somewhat more restrictive" in that Lane first needed to earn more before he could be eligible for the promotion that Villalpando recommended.

When Lane returned to work in early June 1991, no one had any concrete job offer, even though Lane asked Seeb and Mohler for assistance in finding a management position. Lane did not get any career opportunity booklets, which periodically were supposed to list openings.

Around June 17, 1991, Lane met with Goland to give her additional documentation and express concerns of retaliation for filing the complaint. Goland seemed to discount Lane's concerns, and he got the impression that Goland was not going to do anything about his retaliation claim.

In mid-June 1991, Villalpando contacted Goland who instructed Villalpando to document Lane's poor performance.

Not until June 22, 1991, did Solomon offer Lane a spacecraft manager position. Lane considered this position a mere hypothetical position and a demotion in responsibilities because he was previously a spacecraft manager. Lane told Solomon that he wanted his career to move forward. Solomon told Lane that the spacecraft

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[5] Goland denied directing Villalpando or anyone to document poor performance from Lane.

position was not a lesser position, that Lane would be responsible for managing more people, and that the budget would be about eight times greater than Lane's prior budget.

On June 22 Solomon also suggested that Lane speak to manager Jerry Hatch about a short-term position entailing writing proposals for new business. Lane did not express interest in the job.

Meanwhile, Villalpando talked to Mohler, Solomon, Seeb, Miyata and Steele about the lack of a transition plan for Lane. Villalpando received vague responses to his questions, and was told that "big plans" were in store for Lane. Villalpando was also told that Lane did not receive a promotion because he did not earn enough to get promoted. This was the first time Villalpando heard such an excuse for denying an excellent employee a promotion.

Unsatisfied with the responses, Villalpando called Meredith, a level 1 employee, to discuss the discrimination against Lane. Villalpando contacted Meredith because in a meeting held probably in 1989 Meredith expressed concern over the lack of minorities in Hughes' management levels. Villalpando also contacted Meredith because there was still no transition plan for Lane.

Meredith told Villalpando that Hughes decided to make Lane assistant departmental manager to William Phillips, whose laboratory James Bradley ran as of June 1991. Bradley, in turn, reported to Mohler.

Contrary to what Meredith said, Bradley had no intent of assigning any assistant managers. Bradley only offered Lane a temporary job lasting three to six months, and this position had nothing to do with line

management.

Sometime in late June 1991, Solomon told Lane he was assigned to work as Phillips' assistant manager, even though Hughes was eliminating the assistant manager position.[6]

In early July 1991 Lane began working for Phillips. Lane told Phillips about his chronic fatigue, and that he could not work certain evenings because of his church commitments. Although Lane was still organizationally under Villalpando until the transfer would occur, Villalpando was told that he was no longer Lane's supervisor.

At one of Phillips' weekly meetings, which Bradley rarely attended,[7] Phillips introduced Lane and explained what his role was to be. In addition, Phillips made sure in informal conversations that staff understood what Lane's role was. In initial meetings between Phillips and Lane, no one mentioned Lane would be called assistant manager.

Lane was instructed to have test engineers write satellite testing procedures. This assignment was difficult for Lane's predecessors because they had to compete with others for the test engineers' time. Almost initially Lane requested that he be included on the organization chart to notify the test engineers that he

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[6] At some point in time, Phillips told Solomon he thought it was misleading and unfair to give Lane the impression he would be Phillips' assistant manager, since Hughes no longer had such a position.

[7] Bradley disagreed.

had authority to supervise them. However, Lane's request was not honored.

Not being transferred organizationally under Phillips was difficult for Lane because he had to tell a lot of people what to do, yet he was not on the organization chart showing those people had to report to Lane.[8] Lane was not even on the department's "loan list" naming employees working in the department but officially listed in other departments.

Bradley told Phillips that he was dissatisfied with Lane's work.

In late summer of 1991, Hughes reorganized the laboratories, thereby opening up a new line management position. This reorganization was planned beforehand. Yet nobody asked Miyata to give Lane a position in any of the new positions resulting from the reorganization.

Sometime in the summer of 1991, Ed McFarlane, who worked as Phillips' RF Section Head, told Villalpando that upper management agreed to remove some of Villalpando's responsibilities. Then lower management told Villalpando he was going to get more responsibilities. At the same time, Villalpando was starting to receive negative input regarding Lane. Villalpando felt that the negative comments were made in an attempt to change his opinion about Lane.

As of August 20, 1991, Villalpando had a staff of about 45 people, while McFarlane had a staff of about 10

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[8] Even in an organization chart dated as late as October 25, 1991, Lane was shown as under Villalpando instead of Phillips.

people.

In the late summer of 1991, at a presentation before about 10 or 15 people, McFarlane told Villalpando that upper management approved McFarlane to take over some of Villalpando's responsibilities. Solomon was involved in the decision to select McFarlane as head of the newly created RF Department. At the time, McFarlane required additional clearance to fully manage the department.

Unhappy with his encounter with McFarlane, Villalpando talked to Solomon, who assured Villalpando he would receive more responsibility. Villalpando initially accepted a position in the new RF Department whereby he would continue to be responsible for the government portion of the RF activity but would have less responsibilities than before.

In September 1991, Solomon told Lane about another spacecraft opening.

That same month, Solomon spoke with Villalpando about Bradley's opinion that Lane did not show enough leadership or initiative.

On September 30, 1991, Goland scheduled a meeting with Solomon and Miyata to discuss her conclusions following her investigation of Lane's HR complaint. During her investigation, Goland had found that it took an average of five years for a select group of employees to receive a promotion. She found that Lane took the longest in getting a promotion. Although Goland did not know why it took Lane so long to get a promotion, she considered the fact that most people hired out of school had engineering degrees, and Lane had a physics degree. Goland noticed that Lane's early performance appraisals encouraged Lane to take engineering courses,

but she could find no such courses in his record.

Despite assuring Lane that she would not contact his management while conducting her investigation of his complaint, Goland got information from Miyata and Solomon. Miyata, however, only had a peripheral knowledge of the KU Band project, never worked with Lane on any project and did not know his work performance or job title. Goland never spoke with Villalpando about whether Lane should be promoted in 1991.

Goland did not make it part of her investigation to determine whether in general black employees of Hughes were discriminated against in positions similarly situated as Lane. Nor did she try to find out how many blacks were in higher levels than Lane to determine whether Lane was underpaid and under promoted as a result of his race. She considered such an investigation unnecessary.

In investigating Lane's race discrimination claim, Goland did not go to Hughes' affirmative action office. Having never worked in that office, Goland did not understand how affirmative action statistics were kept. Nevertheless, Goland considered company-wide information irrelevant.

During her investigation, Goland discovered a white project engineer with the same title as Lane. The white employee also had a physics degree, had been with Hughes the same length of time as Lane, and was earning the same amount. However, the white employee got his first promotion in less than five years.

At the September 30, 1991 meeting, Goland asked Solomon and Miyata what they would do to resolve Lane's HR complaint. She also discussed the results of

her investigation of the complaint, and her conclusion that there was no discrimination. Right after the meeting, Miyata overheard Bradley mention Lane's poor performance.

Soon after the September 30, 1991 meeting, Villalpando told Lane that Bradley was criticizing Lane's performance. Around this time, Lane was denied three promotion opportunities. These opportunities included promoting Lane to become Phillips' assistant department manager, and giving Lane a position he had held which became elevated to a level 5 position. The denial of the latter opportunity occurred publicly at a meeting.

In early October, Goland gave Lane her findings of no discrimination against him.

On October 1, 1991, Miyata told Villalpando to talk to Bradley because Miyata heard Bradley had performance problems with Lane. Miyata instructed Villalpando to document those problems, and not to talk to Phillips even though Lane was Phillips' assistant.[9]

Villalpando documented what Bradley said. Villalpando then wrote to his department manager, Don Rath, a level 4 employee without a bachelor's degree, that Lane "has not worked up to his potential since April. He could have provided better leadership for the 601TP effort."

Notwithstanding Miyata's order not to talk to Phillips, Villalpando approached Phillips about eight items that Bradley listed regarding Lane's performance. Phillips contradicted six items, stating they were either

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[9] Miyata denied telling Villalpando not to talk to Phillips.

not Lane's responsibilities, Phillips never asked Lane to do them, or they were very low priorities. Of the remaining two items, one item involved a huge task in which maintaining accuracy was difficult, but Phillips felt Lane did the best he could. The other item was Lane's lack of good leadership over people whom Lane had no supervisory control in the organization chart. Phillips opined that Lane met Hughes' performance standards.

Soon after meeting with Villalpando, on October 3, 1991, Phillips met with Bradley and Lane to discuss his work performance.

Bradley discussed where he felt Lane did not meet expectations given Lane earlier in the year. They discussed what role Lane should have, and agreed that this was not a long-term job.

After Villalpando told Miyata about his conversation with Phillips, Miyata instructed Villalpando to write Lane a reprimand for poor performance. Miyata remarked, "Dave, come on man, we are having a tough time deciding between you and Ed [McFarlane], we are looking for one of you to step forward and show that you got what it takes to be a department manager."[10]

Solomon also told Villalpando that Hughes was deciding whether to combine McFarlane's 10 employees with Villalpando's 45 employees, and, if so, whether McFarlane or Villalpando should be department manager.

At one time, Miyata told Villalpando that he had annoyed many people, including Mohler and Meredith,

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[10] Miyata denied making such a statement.

because of his support of Lane.

Feeling pressured by Miyata and Solomon, Villalpando rated Lane's performance as a "3," meeting Hughes standards.

Thereafter, Villalpando encountered Goland and Meredith once outside the building where Villalpando worked. Goland told Villalpando, "I hear you are having performance problems with Jeffrey Lane." Villalpando replied, "That's what Bradley said." Then Goland remarked, "Well, make sure you document it, we're going to need it some day in court." After Villalpando responded that he "wrote everything down," Goland commented, "Isn't it great to see Dave coming around, who would have thought Jeff's strongest supporter would turn on him."[11]

Because Lane was supposed to be transferred under Phillips as of the summer of 1991, Villalpando did not include Lane on Villalpando's promotions list for 1992 promotions. Relying on Villalpando's documentation of Bradley's eight- item list criticizing Lane, and Villalpando's mediocre rating of Lane, Miyata made the final decision to deny Lane's promotion. Solomon was involved in the decision.

On October 16, 1991, Villalpando approached Phillips to request that Lane be transferred and promoted to assistant department manager. Phillips did not object to Villalpando's request.

When Villalpando relayed to Miyata his October 16 conversation with Phillips, Miyata expressed anger at Villalpando's continued support of Lane, and warned

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[11] Goland denied making such a comment.

Villalpando to never talk about promotions for Lane again.

Thereafter, in late October 1991, McFarlane informed Villalpando that McFarlane was going to be the new RF Department manager. Initially, Villalpando was told he was going to work for McFarlane. Villalpando repeatedly asked to meet with Mohler and Miyata, but was told there would be no meeting until Villalpando decided whether he was going to walk away from the rest of his responsibilities.

On October 30, 1991, Solomon told Villalpando in the parking lot that Mohler and Miyata did not want Villalpando around.

After Villalpando decided to give up his remaining duties, Mohler grilled Villalpando in the first week of November 1991 whether to promote Lane. Villalpando tried to avoid answering, and said, "I think I'm not going to buck my upper management anymore."

On November 4, 1991, Mohler learned that Lane was not officially under Phillips. Mohler discussed with Solomon how it would appear that Hughes retaliated against Lane for filing an HR complaint. Mohler instructed Solomon to transfer Lane now, but Solomon did not comply. He also involved Miyata and Seeb.

By November 7, 1991, McFarlane was given all Villalpando's accounts, and Villalpando lost all his responsibilities.

On November 8, 1991, Mohler met with Villalpando. In the past few weeks before the meeting, Miyata, Seeb and Solomon had spoken to Mohler about Villalpando with respect to Lane. At the November 8 meeting, Mohler asked Villalpando whether he believed Lane was discriminated against. Villalpando appeared to be

nervous. At the time, Mohler knew McFarlane instead of Villalpando became the RF Department manager.

After meeting with Villalpando, Mohler decided not to overrule the denial of a promotion for Lane. Mohler based his decision on Villalpando's failure to provide sufficient evidence to overrule the denial of a promotion.

In a letter dated November 11, 1991, Villalpando explained that his responses during Mohler's grilling on November 8 were made under duress.

On November 19, 1991, Goland wrote a report dismissing Lane's discrimination claim. She discounted his high performance ratings in the 1980s, stating that "ratings frequently were inflated during that period." Goland further wrote that she could not decide why Lane was not promoted for more than 10 years.

In December 1991 Phillips and Bradley offered Lane a non-management position as a test engineer in their department. Villalpando chose to work with Martin Short, a trusted friend. Villalpando was offered multiple spacecraft manager jobs, which were lateral positions, and a quality assurance position which would have been a promotion. He declined these offers because the jobs were not under Short and because Short told him that Short heard there were going to be a lot of layoffs in the Quality Assurance Department.

With no substantial tasks for about a four-month period, Villalpando researched the number of black employees in management positions at Hughes. Around the time Lane began having problems with management, only one black employee, Ron Williams, was suddenly promoted to a level 5 effective April 27, 1991.

After Short told Villalpando that he was not going to

support Villalpando, Villalpando began calling lawyers to find out what his rights were. In March 1992, Villalpando telephoned the Paul, Hastings, Janofsky & Walker law firm on a Friday. Villalpando was transferred to a female attorney, who asked him to detail what happened to him and Lane. Then the attorney told Villalpando that she worked for Hughes, and abruptly hung up.

The next Monday, Hughes' in-house counsel Warren Jackson asked Villalpando if he was "the Dave Villalpando that's been calling lawyers?" Jackson told Villalpando that if he had a problem with Hughes, Villalpando should go to HR. Following his conversation with Jackson, Villalpando ran out of the building, and never returned to his job. At the time, Villalpando's wife was seven and a half months pregnant.

Pursuant to a letter written by Steve Dorfman, President of the Space and Communications Division, inviting staff to call Dorfman if they could not resolve a problem, Villalpando tried contacting Dorfman.

When Villalpando finally met with Dorfman, both men had attorneys accompanying them. Hughes Vice President Tom Goley was also present.

In January 1992, Lane took a medical leave of absence due to the deterioration of his health, and he never returned to his job.

The next year, on January 18, 1993, Villalpando began a new job in the aerospace industry. Villalpando earned more at the new job than at Hughes.

STATEMENT OF PROCEDURAL HISTORY

On February 24, 1993, Lane filed in superior court a complaint against Hughes. His causes of action included race discrimination in violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.

In June 1993, Villalpando filed a separate complaint against Hughes.

Lane amended his complaint several times, finally filing a third amended complaint on November 12, 1993.

Both Lane and Villalpando asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and retaliation in violation of FEHA. In addition, Villalpando claimed constructive discharge.

Hughes answered Villalpando's complaint on July 23, 1993, and Lane's third amended complaint on January 24, 1994.

On March 31, 1994, the superior court consolidated Lane's and Villalpando's actions.

On August 17, 1994, Hughes filed a motion in limine to exclude the testimony of Karlene Roberts and Russell Cunningham, whom plaintiffs designated as experts on discrimination, retaliation, and employers' human resources practices, procedures and policies.

Hughes made the motion on grounds that Roberts and Cunningham are not qualified to testify, and that their proposed testimony is irrelevant and prejudicial.

Over Lane's and Villalpando's opposition, on September 7, 1994, the trial court prohibited Roberts and Cunningham from testifying on the ultimate issues of retaliation and discrimination on the ground that such

testimony would invade the province of the jury. The court questioned Roberts' qualifications as an expert.

The case was tried in three phases, first liability, then all damages except punitive damages and last, punitive damages.

At the conclusion of the closing arguments at the liability phase, the trial court on September 29, 1994, orally instructed the jury. The court explained that to prevail against Hughes, Lane and Villalpando need only prove one of their two bases of liability, breach of employment contract and violation of FEHA.

The court quoted portions of subdivisions (a), (f), (g), (h) and (i) of Government Code section 12940. This statute makes it an unlawful employment practice "(a) For an employer, because of the race ... of any person, ... to discriminate against the person in compensation or in terms, conditions or privileges of employment .... [¶] (f) For any employer ... to ... discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part .... [¶] (g) For any person to aid, abet, incite, compel, coerce the doing of any of the acts forbidden under this part, or to attempt to do so. [¶] (h)(1) For an employer ... because of race ... to harass an employee.... Loss of tangible job benefits shall not be necessary in order to establish harassment.... [¶] (i) For an employer ... to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

The trial court further instructed that if Lane offers evidence that Hughes treated him differently because of his race, and if Hughes produced evidence that it had

legitimate, nondiscriminatory and nonretaliatory reasons for its actions, then Lane may rebut Hughes evidence by "either directly showing that a discriminatory reason more likely was involved or indirectly by showing that the employer's explanation lacks credibility or is untrustworthy and not worthy of belief. [¶] ... The burden is always on the plaintiff to prove by a preponderance of the evidence that defendant discriminated against him because of his race." The court explained that Lane need not prove race was the sole or even dominant factor influencing Hughes to take adverse employment action. Instead, Lane "need only show that there was a causal connection between plaintiff's race and the company's adverse employment action."

On October 4, 1994, the jury returned verdicts for Lane and Villalpando on the liability stage. The jury found that Hughes breached its employment contract with Lane requiring termination only for good cause, constructively discharged Villalpando in breach of its employment contract with Villalpando, breached the implied covenant of good faith and fair dealing, discriminated against Lane because of his race, and retaliated against Lane and Villalpando because they reported the discrimination. The jury also found that Lane and Villalpando proved by clear and convincing evidence that Hughes was guilty of malice, oppression, fraud or despicable conduct.

A polling of the jury showed the jurors were unanimous in reaching their findings.

On October 6, 1994, the trial court heard Hughes' motion in limine to exclude the testimony of licensed social worker Victoria Dellaverson, Villalpando's

treating psychotherapist, on the grounds that she is not qualified to testify as a psychoanalyst, and that her proposed testimony is irrelevant and prejudicial. The trial court granted the motion.

During the second phase of the trial, the plaintiffs' family members testified. Lane's treating psychiatrist, David Friedman, M.D., Ph.D., testified about Lane's depression. Economist Joyce Pickersgill, Ph.D., testified on behalf of Lane and Villalpando.

On October 13, 1994, after closing arguments on all damages except punitive damages, the trial court instructed the jury, among other things, that it may not award plaintiffs economic or noneconomic damages for Hughes' conduct before February 1, 1989.

On October 18, 1994, the jury awarded Lane $295,000 for lost wages and other economic damages to his date of termination, $2.3 million for loss of wages and work-related benefits after October 6, 1994, and $3.5 million for emotional distress and other noneconomic damages. Villalpando was awarded $125,000 for lost wages and other economic damages through October 6, 1994, after subtracting all wages and work-related benefits that Villalpando may have received from any other employer and any loss of wages or work-related benefits that Villalpando may have sustained due to his failure, if any, to take reasonable efforts to seek comparable employment. The jury also awarded Villalpando $1.3 million for future loss of wages and work-related benefits after October 6, 1994, and $2 million for emotional distress and other noneconomic damages.

The jury was polled, and the jurors were unanimous on all findings except two jurors disagreed with the $3.5

million award for Lane's noneconomic damages.

Thereafter, the third phase of the trial on punitive damages commenced. During this phase, Hughes stipulated that there was no written evidence of any reprimand or discipline taken against Solomon, Miyata, Goland and Mohler.

Only one witness testified in the trial's last phase. This witness, David Barclay, was vice president of Hughes' work force diversity. Over plaintiffs' objection, made in a trial brief dated October 13, 1994, to any evidence that Hughes reformed its conduct for the purpose of mitigating its liability for punitive damages, Barclay testified about Hughes' programs to benefit minorities. These programs included Hughes' involvement in schools to encourage minorities to study mathematics and science. Barclay testified that in January 1993 Hughes changed its internal grievance procedure. He also testified that at the time of trial, Hughes had seven black vice-presidents. On cross-examination, Barclay said that the first time he heard about Lane's and Villalpando's lawsuits was after the jury returned its verdicts.

On October 24, 1994, the jury reached two verdicts on the trial's last phase. The jury awarded each plaintiff $40 million in punitive damages against Hughes. A polling of the jury showed the jurors were unanimous in finding punitive damages should be awarded, but that two jurors did not agree with the amount of damages.

Following the entry of verdicts, the law firm of Paul, Hastings, Janofsky & Walker associated into the action as Hughes' co-counsel. Previously, only the law firm of Arter & Hadden was Hughes' attorney of record.

On November 9, 1994, Hughes moved for a judgment

notwithstanding the verdicts. Hughes also filed a notice of intention to move for a new trial pursuant to Code of Civil Procedure section 657 or alternatively a remittitur pursuant to Code of Civil Procedure section 662.5.

Lane and Villalpando moved to disqualify the law firm of Paul, Hastings, Janofsky & Walker as defense counsel.

On December 15, 1994, the trial court heard all three motions, granted Hughes' motions for a judgment notwithstanding the verdicts and a new trial, and denied plaintiffs' motion.

A court order drafted and signed by Trial Judge Malcolm Mackey stated that a new trial was granted on grounds of excessive damages, insufficiency of evidence to justify the verdict and decision, error in law, and misconduct of counsel. The order rejected Lane's race discrimination and retaliation claims, Villalpando's retaliation and constructive discharge claims, and the awards for "front pay" damages and punitive damages.

On December 23, 1994, the trial court entered a judgment for Hughes notwithstanding the verdicts.

DISCUSSION

Lane and Villalpando first appeal the judgment notwithstanding the verdicts, and next the alternative grant of a new trial. They then raise issues regarding the trial court's exclusion of their experts, Roberts and Cunningham, the exclusion of Villalpando's psychotherapist, Dellaverson, the admission of Barclay's testimony at the trial's punitive damages stage, the jury instruction that Lane could not recover damages accruing before a certain time, and the denial of their

motion to disqualify the Paul, Hastings, Janofsky & Walker law firm as Hughes' counsel. We first consider the judgment notwithstanding the verdicts, as resolution of this matter determines whether it is necessary to consider the remaining matters contested by appellants.

I
SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICTS

"In passing upon the propriety of a judgment notwithstanding the verdict, appellate courts view the evidence in the light most favorable to the party who obtained the verdict and against the party to whom the judgment notwithstanding the verdict was awarded. [Citations.] In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546, 138 Cal.Rptr. 705, 564 P.2d 857.)

A. The Judgment Notwithstanding the Verdict on Lane's Race Discrimination Claim

Lane's third amended complaint asserted in part that Hughes violated FEHA by treating him less favorably as a black man than employees of other races.

Where, as here, disparate treatment based on race is alleged, "the plaintiff must prove the ultimate fact that the defendant engaged in intentional discrimination." (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748, 52 Cal.Rptr.2d 620, citing *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407, *Texas Dept. of Community*

Affairs v. Burdine (1981) 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 and *Mcdonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.)

Race discrimination cases are subject to a three-step analysis. "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [Citation.] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. [Citation.]" (*Texas Dept. of Community Affairs v. Burdine, supra*, 450 U.S. at pp. 252-253, 101 S.Ct. at p. 1093.)

Hughes contends that in applying the third step for analyzing a disparate treatment case, one can use only three types of specific and probative evidence to prove that the employer's legitimate, nondiscriminatory reason for making an employment decision is in fact a pretext for race discrimination. Citing Schlei and Grossman, Employment Discrimination Law (2d ed.1983, Supps.1989 and 1991) page 1314, Hughes states the three types of evidence are (1) direct evidence of discrimination, such as discriminatory statements or admissions; (2) comparative evidence; and (3) statistics.

In arguing for limiting the evidence, Hughes cites *Miles v. M.N.C. Corp.* (11th Cir.1985) 750 F.2d 867, 870 and *Penk v. Oregon State Bd. of Higher Edn.* (9th Cir.1987) 816 F.2d 458, 462 as support. However, while

these two federal opinions list the same three types of evidence, they significantly do not hold that these are the only types of evidence available to prove pretext.

Rather, both federal cases state that these three types of evidence "can" be used, thereby suggesting the availability of other types of evidence.

In fact, it is well established that indirect or circumstantial evidence may be used to show discrimination. (*Heard v. Lockheed Missiles & Space Co., supra,* 44 Cal.App.4th at p. 1749, 52 Cal.Rptr.2d 620.) Accordingly, "[i]f the employer successfully rebuts the presumption raised by the prima facie case, 'the McDonnell/Burdine presumption "drops from the case" and the factfinder must decide upon *all of the evidence* before it whether defendant intentionally discriminated against plaintiff. [Citation.] In short the trier of fact decides whether it believes the employer's explanation of its actions or the employee's.' [Citation.]" (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 664, 8 Cal.Rptr.2d 151, italics added.)

Hughes further contends that Lane failed to show a causal connection between Lane's protected status as a black person and Hughes' treatment of Lane. As Hughes correctly points out, the plaintiff must prove by a preponderance of the evidence a causal connection between the plaintiff's protected status and the adverse employment decision. (*Clark v. Claremont Univ. Center, supra,* 6 Cal.App.4th at p. 665, 8 Cal.Rptr.2d 151.)

However, Hughes inappropriately compares *Gonzales v. MetPath, Inc.* (1989) 214 Cal.App.3d 422, 262 Cal.Rptr. 654 to the present action. In that case, Helen Gonzales sued her employer, MetPath, Inc., for

discriminating against her because of her Mexican-American heritage and her gender. MetPath moved for and was granted summary judgment. The appellate court affirmed, concluding that Gonzales "did not even establish a prima facie case" of discrimination. (*Id.* at p. 426, 262 Cal.Rptr. 654.) In contrast, it is uncontested that Lane set forth a prima facie case of discrimination. Therefore, *Gonzales* is distinguishable from the instant action.

Hughes also erroneously argues that the judgment notwithstanding the verdict was supported by the lack of evidence that Steele, Phillips or Bradley was biased against Lane. However, a plaintiff need not prove that every representative of an employer intentionally discriminated against the plaintiff. (*Clark v. Claremont University Center, supra,* 6 Cal.App.4th at p. 668, 8 Cal.Rptr.2d 151.) What matters in a disparate treatment case is "whether a particular individual was discriminated against and why." (*Heard v. Lockheed Missiles & Space Co., Inc., supra,* 44 Cal.App.4th at p. 1756, 52 Cal.Rptr.2d 620.)

In *Clark, supra,* Reginald Clark sued Claremont Graduate School for race discrimination after being denied promotion and tenure. (*Clark v. Claremont University Center, supra,* 6 Cal.App.4th at p. 643, 8 Cal.Rptr.2d 151.) Claremont hired Clark in 1979 as an assistant professor in the education department for a three-year term, and renewed his contract in 1982 for another three-year term. According to Claremont's rules on staff appointments, promotions and tenure (APT), a full-time faculty member may not serve without tenure for more than seven years, including credited experience. Clark requested tenure in his fifth year at

Claremont. While his departmental review resulted in a five-to-three vote for Clark, the former and current department chairmen voted against him. At the second level of review, the APT committee voted against Clark by a four-to-one vote. Clark appealed to Claremont's president, who upheld the APT committee's decision. (*Ibid.*)

Quoting *Roebuck v. Drexel University* (3d Cir.1988) 852 F.2d 715, 727, the court in Clark stated, " 'It is true that University guidelines and witness testimony support [Claremont's] claim that each successive evaluator performed a de novo review of [Clark's] candidacy. Nevertheless, it is also uncontroverted that at each stage of the process the evaluator had available *and considered* the reports and recommendations of each previous evaluator.... Hence it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decision making process and thus allowed discrimination to infect the ultimate decision.' " (*Clark v. Claremont University Center, supra*, 6 Cal.App.4th at pp. 665-666, 8 Cal.Rptr.2d 151.)

Roebuck, supra, was further quoted, "'once the jury concluded that a particular rating decision at any given level was motivated by discrimination and would have come out differently but for that discrimination, the jury was also free to infer that that discrimination infected other decisions concerning the very same candidate and made at the very same time.'" (*Clark v. Claremont University Center, supra*, 6 Cal.App.4th at p. 667, 8 Cal.Rptr.2d 151.)

Relying on *Roebuck, supra*, the Clark court held that the Claremont president's independent investigation and

review of Clark's case "does not insulate Claremont from liability as a matter of law." (*Clark v. Claremont University Center, supra,* 6 Cal.App.4th at p. 669, 8 Cal.Rptr.2d 151.)

As recognized in *Clark, supra,* quoting *Roebuck, supra,* individual employment decisions should not be treated as a " 'watertight compartment' " with discriminatory actions " 'sealed off from (that is, irrelevant to) every other decision. In the real world ... human beings (including triers of fact) are not compelled to reason that way.'" (*Clark v. Claremont University Center, supra,* 6 Cal.App.4th at p. 667, 8 Cal.Rptr.2d 151.)

Therefore, even if Steele, Phillips and Bradley were not biased against Lane because of his race, as long as the resulting employment decisions to remove him from the KU Band and to not promote him resulted from race-based bias, the judgment notwithstanding the verdict is erroneous.

Hughes compares Lane to the plaintiffs in *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 237 Cal.Rptr. 884 and *Moore v. Eli Lilly & Co.* (5th Cir.1993) 990 F.2d 812 in that Hughes maintains Lane complains of multiple unfair acts but shows no causal connection between his race and those acts. However, *Mixon* and *Moore* are factually distinguishable.[12]

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[12] Following oral argument, Hughes called our attention to *Nidds v. Schindler Elevator Corp.* (9th Cir.1996) 103 F.3d 854. There, the federal appellate court affirmed a summary judgment for the defendant-

Unlike Lane's supervisors and management, Robert Mixon's supervisor, who interviewed him for his job as a union representative in the union's Stockton office and later fired him for refusing to relocate in order to reduce the union's expenses, was black, as well as one of the vice presidents. (*Mixon v. Fair Employment & Housing Com., supra,* 192 Cal.App.3d at p. 1320, 237 Cal.Rptr. 884.) All of Lane's supervisors and management were not black.

When interviewed, Mixon was told he would be required to relocate if his commute interfered with his work. Unlike Lane, Mixon was a new employee of less than one year whose employment was subject to the contingent requirement that he relocate. Mixon was repeatedly told to relocate and was notified as early as the first month after starting work that his travel expenses were too high for the union's Stockton office. Although Mixon offered evidence of several white union representatives who commuted significant distances to their offices, none of those white employees serviced the Stockton office, whose members' union dues did not cover the office's operating costs. (*Mixon v. Fair Employment & Housing Com., supra,* 192 Cal.App.3d at

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employer in an action based on alleged age discrimination and retaliation asserted under California law. The court held that the plaintiff did not show the employer's stated reasons for laying off the plaintiff were pretextual for an illegal termination. The *Nidds* opinion is inapposite, factually differing from the cause before us and providing no new guidance on parties' burdens of proof in race discrimination cases.

pp. 1320-1321, 237 Cal.Rptr. 884.)

In contrast, Lane attempted to comply with his supervisors' orders, and was told that he met his employer's job requirements. While it is true that Lane expressed his desire not to work on classified material for religious reasons, this request was made in 1985, six years before he was removed from the KU Band. Likewise, his decision not to work after certain business hours was made years before the 1991 incidents, and was based on his long- standing church activities.

Jimmy Moore, who sued his employer for age discrimination, failed to produce any evidence of pretext, "either in connection with establishing his prima facie case or subsequently in response to Lilly's demonstration of a non- discriminatory reason for its action." (*Moore v. Eli Lilly & Co., supra,* 990 F.2d at p. 817.)

Unlike Moore, Lane proved that Hughes' reasons for not promoting him were pretext for a discriminatory reason. For example, although Goland found a white employee with Lane's same title and educational background, she significantly did not recall the white employee's performance evaluations and responsibilities. A legitimate comparison between employees requires knowledge of how an employee performs and what his duties are. The lack of such knowledge reveals the superficiality of Goland's investigation.

Another nondiscriminatory reason that Hughes gave for Lane's compensation and rank level was that Lane had a physics degree instead of an electrical engineering degree and that he did not obtain the degree until after he began work in 1977. However, there was evidence at

trial that other, non-black employees ranked higher than Lane lacked bachelor's degrees, and not everyone had an electrical engineering degree. Furthermore, no one controverted Lane's testimony that he studied engineering independently at home. More importantly, Lane satisfactorily performed his tasks. In fact, Mohler, whose laboratories Lane worked in at all relevant times, testified that Mohler never got complaints about Lane's technical abilities or performance. As Laboratories Manager, Mohler was ultimately responsible for the staff under him. Therefore, the fact that he heard no complaints suggests that Hughes' focus on Lane's educational background constituted a mere pretext for discriminating against Lane.

As for Lane's managerial skills, it is relevant that Mohler testified that he never received complaints about Lane's ability to work with people. This testimony pierces a hole in Hughes' excuses for taking Lane's managerial duties away from him.

Viewing the record as a whole and in deference to the jury's factual findings, we hold substantial evidence supported the verdict in Lane's race discrimination claim.

B. The Judgment Notwithstanding the Verdicts on the Retaliation Claims of Lane and Villalpando

In their respective complaints, Lane pleaded that Hughes unlawfully retaliated against him for complaining about race discrimination, and Villalpando pleaded that Hughes retaliated against him for opposing Hughes' race discrimination against Lane.

Retaliation claims under FEHA "are analogous to

federal [Title VII] claims ..., and are evaluated under federal law interpreting Title VII cases. [Citations.] [¶] The elements of Title VII and CFEHA claims require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal termination. [Citations.]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476, 4 Cal.Rptr.2d 522, fn. omitted.)

"To establish a prima facie case, the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action. [Citations.]" (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 476, 4 Cal.Rptr.2d 522.) Pretext for a company's nonretaliatory explanation for the employment action may be "inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Id.* at p. 479, 4 Cal.Rptr.2d 522.)

Hughes' reason for denying Lane a promotion after he filed his internal race discrimination complaint was that Hughes acted pursuant to Villalpando's request. While Miyata testified that he denied the promotion pursuant to Villalpando's request, Villalpando testified to the contrary. Where, as here, the evidence is in conflict, the reviewing court must defer to the findings of fact made in the trial court. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, 243 Cal.Rptr. 902, 749 P.2d 339.) Therefore, Villalpando's testimony undermines

Hughes' purported reason for not giving Lane the promotion Villalpando requested for 1991. However, even if Miyata's testimony were uncontroverted, given the fact that at this time Phillips, not Villalpando, was supposed to have been Lane's supervisor for months, Miyata's reliance on Villalpando constitutes a pretext for retaliating against Lane for filing the internal discrimination complaint.

Moreover, Mohler had authority to overrule decisions regarding promotions. In light of Phillips' satisfaction with Lane and Mohler's testimony that Lane was a good employee, Mohler's failure to overrule Miyata's denial of a promotion indicated that Hughes punished Lane for complaining about race discrimination.

With respect to Villalpando's retaliation claim, it is important to consider the purpose of the statutory law prohibiting employer retaliation against "whistle blowers." "Both the state and federal statutes are designed to foster open communication between an employer and its employees regarding perceived misconduct, encouraging employees to call their employers' attention to unlawful practices of which the employer might be unaware and which might result in litigation if not voluntarily changed. [Citation.] CFEHA goes even further than the federal statute by requiring that supervisors 'take immediate and appropriate corrective action' when harassment is brought to their attention. (Gov.Code, § 12940, subd. (h).) The statute then protects the supervisor who properly takes immediate corrective action from retaliation." (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 476, 4 Cal.Rptr.2d 522.)

Rather than protect Villalpando for supporting Lane's

race discrimination claim, Hughes pressured Villalpando into creating a paper trail against Lane, in part by threatening to give McFarlane a promotion over Villalpando unless Villalpando cooperated. The company then penalized Villalpando for not completely cooperating in working against Lane. Significantly, Villalpando learned the promotion went to McFarlane just less than two weeks after Villalpando tried to salvage Lane's career by telling Miyata that Lane should be promoted to Phillips' assistant department manager - a position Solomon had initially misled Lane into believing he was already supposed to obtain. The timing of these events constitutes circumstantial evidence of retaliation.

Viewing the evidence in the light most favorable to Lane and Villalpando, a reasonable trier of fact could conclude that Hughes' articulated reasons for not promoting Lane and Villalpando are merely a pretext for retaliating against them.

C. The Judgment Notwithstanding the Verdict on Villalpando's Constructive Discharge Cause of Action

To establish constructive discharge, Villalpando had to plead and prove by a preponderance of the evidence that Hughes "either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the

employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner v. Anheuser-Busch, Inc.*, (1994) 7 Cal.4th 1238, 1251, 32 Cal.Rptr.2d 223, 876 P.2d 1022.)

Villalpando's complaint pleaded that Hughes required Villalpando to falsely document Lane's performance as poor after Lane filed an internal race discrimination grievance, that Hughes removed Villalpando from his supervisory position and demoted him "in a manner calculated to embarrass him personally and professionally" even though positions comparable to the one from which he was removed were available, and that Hughes refused to meet with Villalpando and resolve his complaints of Hughes' unfair treatment of Villalpando and Lane. In addition, the complaint asserted that Hughes coerced Villalpando "into criticizing and neutralizing or withdrawing his support" for Lane, and forced Villalpando to create a fictitious justification for Hughes' mistreatment of Lane because Lane complained about race discrimination and because Hughes "had an unspoken policy establishing an artificial barrier" preventing black employees from obtaining management positions and wages.

We hold that these allegations support a constructive discharge cause of action.

Hughes defends the judgment notwithstanding the verdict partly by quoting Turner as holding that "a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner v. Anheuser-Busch, Inc., supra*, 7 Cal.4th at p. 1247, 32 Cal.Rptr.2d 223, 876 P.2d 1022.) However, the California Supreme Court recognized that "[i]n some circumstances, a single intolerable incident, such as ... an

employer's ultimatum that an employee commit a crime, may constitute a constructive discharge." (*Id.* at p. 1247, fn. 3, 32 Cal.Rptr.2d 223, 876 P.2d 1022.) According to Villalpando's testimony at trial, Miyata threatened that McFarlane would be promoted over Villalpando unless Villalpando cooperated in creating false documentation against Lane. At two relevant time periods, Goland, whom Villalpando knew was an attorney and knew was handling Lane's internal complaint, urged Villalpando to sabotage Lane's career. The first occasion was in early June 1991, soon after Lane filed his internal complaint, and the second occasion was around the time Miyata threatened Villalpando with the denial of his own promotion. Clearly, this evidence indicates that Hughes' management tried to pressure Villalpando to commit the crime of perjury and to violate FEHA. We hold that such intolerable employer action would force a reasonable employee to leave his job. Therefore, there is substantial evidence in support of Villalpando's constructive discharge claim.

D. The Judgment Notwithstanding the Verdicts on Plaintiffs' Breach of Implied Covenant Claims

Lane's and Villalpando's respective complaints alleged that Hughes breached its implied covenant of good faith and fair dealing by evaluating the two employees arbitrarily and falsely, removing their managerial duties for arbitrary and untrue reasons, and refusing to place them in available, alternative employment. Lane further pleaded that Hughes committed a breach by subjecting him "to higher and more onerous" performance standards than other

employees, and not paying him at a level commensurate with his performance, skills and responsibilities. Villalpando pleaded that Hughes committed a breach by requiring Villalpando to violate the law and ethics by falsely documenting Lane's performance as deficient, and requiring Villalpando to conspire to subject Lane to adverse employment actions because he filed an internal discrimination grievance "and in observance of an unspoken but enforced glass ceiling" preventing blacks from advancing above a certain managerial level.

In opposition to the judgment notwithstanding the verdicts on the claims of breach of implied covenant, Lane and Villalpando cite *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 46 Cal.Rptr.2d 427, 904 P.2d 834 and *Garcia v. Rockwell International Corp.* (1986) 187 Cal.App.3d 1556, 232 Cal.Rptr. 490.

C. Byron Scott and Al Johnson sued Pacific Gas and Electric Co. (PG & E) for breach of an implied contract term not to demote employees without good cause. (*Scott v. PG & E, supra,* 11 Cal.4th at p. 460, 46 Cal.Rptr.2d 427, 904 P.2d 834.) Uncontradicted evidence at trial showed that PG & E intended to bind itself to written disciplinary policies which discussed demotion as an intermediate disciplinary step short of discharge. (*Id.* at p. 461, 46 Cal.Rptr.2d 427, 904 P.2d 834.) In contrast, the record in the instant case contains no evidence that Hughes intended to bind itself contractually as a result of any written policies, and Lane and Villalpando were not demoted in terms of their rank levels. Instead, they were denied promotions.

While Lane and Villalpando are correct that the California Supreme Court in *Scott, supra,* 11 Cal.4th at page 464, 46 Cal.Rptr.2d 427, 904 P.2d 834, held that

implied employment contract terms are not limited to the wrongful discharge area, this holding is inapposite here.

Like the plaintiffs in Scott, Joe Garcia in *Garcia v. Rockwell International Corp., supra,* 187 Cal.App.3d at page 1558, 232 Cal.Rptr. 490, sued his employer for being demoted. In addition, Garcia sued for being suspended without pay. Rockwell moved for and was granted summary judgment. (*Ibid.*) Not only is *Garcia* factually distinguishable, but it does not concern any contractual breach claims. Rather, the cause of action at issue in *Garcia* is for retaliation. (*Id.* at pp. 1558, 1560, 232 Cal.Rptr. 490.) The appellate court reversed on grounds based on tort, not contract, law. (*Id.* at p. 1562, 232 Cal.Rptr. 490.)

Nevertheless, since substantial evidence supports Lane's and Villalpando's claims under FEHA, *a fortiori* their claims of breach of the implied covenant of good faith and fair dealing must also withstand a judgment notwithstanding the verdicts.

E. The Judgment Notwithstanding the Verdicts on Damages

The trial court's order granting Hughes' motion for judgment notwithstanding the verdicts with respect to damages mentions only one aspect of the verdicts, "front pay." According to the court order's specification of reasons, front pay was not awardable as a matter of law "because both plaintiffs rejected unconditional offers of reinstatement." These offers were made during a one-day adjournment on October 5, 1994, after Hughes President Donald Cromer was advised of the jury's

verdicts finding Hughes liable for discrimination and retaliation.

Whether Hughes' offers were in good faith and whether Lane and Villalpando were reasonable in rejecting the offers are questions for the jury as the trier of fact. (*Ortiz v. Bank of America National Trust and Savings Assoc.* (9th Cir.1987) 852 F.2d 383, 387.) Given the timing of the offers, it would have been reasonable for the jury to find Hughes did not make them in good faith.

In examining whether the damage awards were excessive, we try to uphold damages awards whenever possible. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61, 118 Cal.Rptr. 184, 529 P.2d 608.) However, examining each case on its own facts, the reviewing court should act where an award as a matter of law appears excessive. Whether an award "is so great as to shock the conscience of appellate judges and necessarily implies passion and prejudice on the part of the jury depends upon the nature and extent of the victim's injuries, his pain, suffering and humiliation, and the amount of special damages that may have been incorporated in the total award." (*Henninger v. Southern Pacific Co.* (1967) 250 Cal.App.2d 872, 882-883, 59 Cal.Rptr. 76.)

Looking at the record here, we note quite a few ambiguities and omissions. Plaintiffs' economist, Dr. Pickersgill, opined that Lane's lost bonuses at their present value amounted to $67,000, and that his lost wages through his termination amounted to $238,596. While this figure is close to the jury's $295,000 economic damages award, the record is unclear when this termination date occurred, since Lane might still have

been paid when he took his medical leave of absence in January 1992. A medical leave of absence would support a damages award for lost wages only if the leave of absence is without pay.

According to Lane's treating psychiatrist, Dr. Friedman, Lane could no longer work at a large corporation. Assuming this is the case and considering that Lane was 39 years old in 1994, he lost over twenty years of employment at a large corporation. This constitutes a significant period for anticipated future earnings. However, it is questionable whether or not the jury gave an excessive award of $2.3 million for loss of wages and work-related benefits after October 6, 1994. According to the testimony of Lane's wife and oldest son, as well as Lane's own testimony, Lane continued to volunteer for his church and worked with his wife on her home-based courier business created sometime after Lane stopped working for Hughes. It is uncertain whether these activities indicated Lane's ability to work full time, and whether Lane will contribute to making the courier business profitable.

The jury awarded Villalpando $125,000 for economic damages, yet Dr. Pickersgill did not testify as to her opinion relative to Villalpando's lost wages or other economic damages. Although Villalpando did not work from March 1992 to January 18, 1993, we cannot know from the record whether Villalpando received all of his paid leaves of absence, including for illness and vacation. We also do not know how much Villalpando would have earned had he received the promotion instead of McFarlane. Another troubling section of the record is that the job Villalpando began in January 1993 evidently paid more than his job at Hughes, but the

record is silent as to how much Villalpando earned at either position.

In view of the record, we cannot adequately review the economic damages award for Villalpando. Nevertheless, given Villalpando's managerial position in the high-paying aerospace industry, a $125,000 award for economic damages through October 6, 1994 may not be unreasonable.

As for the jury's award of $1.3 million for Villalpando's economic damages after October 6, 1994, the record is deficient in this area as well. While Dr. Pickersgill opined that Villalpando's work life expectancy ended at age 62.5 years, there was no testimony in the record on Villalpando's age, a relevant factor in deciding whether the $1.3 million award is excessive. Moreover, although Villalpando testified that he could no longer supervise others, the fact that he obtained a higher paying job than at Hughes may show his constructive discharge did not harm his future earning ability. On the other hand, he may have earned even more had he been promoted over McFarlane. However, how much more Villalpando would have earned is not in evidence. Notwithstanding the record's deficiencies, the fact that the jury awarded Villalpando $1 million less than Lane shows the jury considered that Villalpando was in a financially better situation than Lane. In deference to the jury as the trier of fact, we will not disturb this award.

We also defer to the jury's role as the trier of fact on the amount of noneconomic damages awarded to Lane and Villalpando. The jury's award of $1.5 million more to Lane than to Villalpando shows the jury recognized that Lane, as the direct victim of race discrimination,

suffered more than Villalpando.

Review of the punitive damages awards requires consideration of two issues. The first issue is whether clear and convincing evidence shows the defendant was guilty of oppression, fraud, or malice. (Civ.Code, § 3294.) "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ.Code, § 3294, subds.(a) and (b).)

If the first preliminary issue is answered in the affirmative, punitive damages are recoverable. The second issue is whether substantial evidence supports the amount of punitive damages awarded.

With respect to the first issue as applied to corporate defendants, "[t]he determination whether employees act in a managerial capacity ... does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 822-823, 169 Cal.Rptr. 691, 620 P.2d 141.)

Pursuant to *Egan, supra,* the California Supreme Court deemed two employees "managing agents" for punitive damages purposes, even though the employees were lower in a company's hierarchy than other corporate officials who participated in plaintiff Anand Agarwal's discharge. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 952, 160 Cal.Rptr. 141, 603 P.2d 58.) The court focused on the fact that the two employees "were directly responsible for supervising Agarwal's

performance and had the most immediate control over the decision to terminate him." (*Ibid.*)

In rejecting the verdicts here, the trial court noted that there was no evidence of vicious racist remarks and epithets, and no statistical evidence of discrimination. The lack of such evidence, however, does not invalidate the punitive damages awards. That race discrimination can come in subtle, covert forms does not mean there is any less malice than found in the more blatant, overt forms.

As support for the judgment notwithstanding the verdicts, Hughes argues that *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 27 Cal.Rptr.2d 457 is on point because no officers or directors were involved in any decisions in the present case. This argument lacks merit, as Miyata, Solomon and Mohler were clearly managing agents for purposes of Civil Code section 3294.

In *Kelly-Zurian, supra,* Kathleen Kelly-Zurian sued her supervisor, Robert Lawicki, and her former employer, Wohl Shoe Co., for sexual harassment. Lawicki was the highest level Wohl employee in Southern California, but Wohl's corporate headquarters were in St. Louis, Missouri. The jury returned a verdict against Lawicki and for Wohl, finding that Lawicki's conduct involved oppression or malice. (*Kelly-Zurian v. Wohl Shoe Co., supra,* 22 Cal.App.4th at p. 407, 27 Cal.Rptr.2d 457.) Kelly-Zurian then moved for a new trial on the issue of punitive damages with respect to Wohl. The trial court denied the motion. (*Id.* at p. 408, 27 Cal.Rptr.2d 457.)

Affirming the denial, the *Kelly-Zurian* court ruled that Lawicki was not a managing agent for purposes of

Civil Code section 3294.

In so ruling, it considered the absence of evidence showing Lawicki was in a policy- making position and Wohl's evidence that Lawicki lacked authority to change or establish business policy in Southern California. The court also considered Lawicki's inability to even set Kelly-Zurian's salary or give her a raise without authorization from Wohl's corporate headquarters. (*Kelly-Zurian v. Wohl Shoe Co., supra*, 22 Cal.App.4th at p. 422, 27 Cal.Rptr.2d 457.)

In contrast, Mohler, Miyata and Solomon, who were based in Hughes' Southern California headquarters, admitted having authority regarding promotions, assignments, affirmative action and transfers. They clearly had control over Villalpando's and Lane's employment conditions.

Based on the record, we conclude that punitive damages were recoverable.

While the amount of punitive damages is not fixed or susceptible to mathematical calculation (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790, 157 Cal.Rptr. 392, 598 P.2d 45), in determining the second issue of whether substantial evidence supports the amount of punitive damages, we consider the degree of reprehensibility of the defendant's conduct and the relationship between the amount of the award and the actual harm suffered. (*neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, 148 Cal.Rptr. 389, 582 P.2d 980.) Although a defendant's financial condition is another factor to consider (*Ibid.*), we cannot adequately do so in light of the record. However, we do recognize the recent recession's impact on the aerospace industry and the federal government's cutbacks in the defense

industry.

While race discrimination is clearly reprehensible, the punitive damages awards far exceeded the compensatory damages awarded here. The jury awarded 85 percent more in punitive damages for Lane than the $5,595,000 in total economic and noneconomic damages, and more than 91 percent more in punitive damages for Villalpando than the $3,425,000 in total economic and noneconomic damages.

Moreover, in contrast to the jury's award of less compensatory damages to Villalpando than to Lane, the jury awarded each plaintiff $40 million in punitive damages. The identical awards indicate the jury did not differentiate between the two plaintiffs' injuries. As a direct victim of race discrimination, Lane was entitled to a greater award than Villalpando.

Having concluded the punitive damages awards are excessive, we exercise our discretion to promote justice and the public policy of judicial economy by modifying the awards. We remand with directions to the trial court to reduce Lane's punitive damages award to $5 million and Villalpando's punitive damages award to $2,830,000.

II
.NEW TRIAL ORDER ON LIABILITY, DAMAGES AND PUNITIVE DAMAGES RESULTS FROM ABUSE OF DISCRETION

Hughes moved for a new trial on five grounds. One, there was insufficient evidence to justify the verdicts, and the verdicts are against the law. Two, the damage awards were excessive, speculative and not based on the

evidence. Three, the jury engaged in prejudicial misconduct preventing Hughes from having a fair trial. Four, irregularity in the proceedings of the trial court, jury and plaintiffs prevented Hughes from having a fair trial. Five, there was error in law occurring at trial and excepted to by Hughes. All five grounds are set forth in Code of Civil Procedure section 657 as support for a new trial.

In its order and specification of reasons for granting Hughes' motions for judgment notwithstanding the verdicts and for a new trial, the trial court stated that it alternatively granted a new trial on liability and all damages, including punitive damages. Pursuant to Code of Civil Procedure section 657, the trial court's specified reasons for granting a new trial were that insufficient evidence supported the verdicts, the damage awards were excessive,[13] and that plaintiffs' trial counsel engaged in misconduct that resulted in an irregularity in the proceedings preventing Hughes from having a fair trial.

"On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground

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[13] Code of Civil Procedure section 657 prohibits the granting of a new trial on grounds of insufficient evidence and excessive damages "unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."

of the insufficiency of the evidence to justify the verdict. . ., or upon the ground of excessive. . ., unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict. . ., or upon the ground of excessive. . . damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (Code Civ. Proc., § 657.)

Notwithstanding our decision regarding the judgment notwithstanding the verdicts, we consider the order for a new trial. We do so because Hughes' motion and the trial court's order for a new trial raise the additional issues of error in law, and misconduct by the jury, counsel and the trial court. However, we need not consider the trial court's grant of a new trial on the bases of insufficiency of evidence and excessive compensatory damages, as we already analyzed the record with respect to the judgment notwithstanding the verdicts.

Citing *Musgrove v. Ambrose Properties* (1978) 87 Cal.App.3d 44, 54-57 and *McCown v. Spencer* (1970) 8 Cal.App.3d 216, 227, Lane and Villalpando initially argue that the new trial order is reviewable de novo. However, neither case supports appellants' position. In fact, concurring and dissenting Justice Hanson states in *Musgrove* that the abuse-of-discretion standard of rule applies, and the majority opinion quotes Code of Civil Procedure section 657 as requiring reversal only if no substantial basis in the record supports any of the trial court's reasons for granting a new trial. (*Musgrove v.*

Ambrose Properties, supra, 87 Cal.App.3d at pp. 54-57.) Likewise focusing on Code of Civil Procedure section 657, the court in *McCown* did not apply the independent judgment test in analyzing the trial court's grant of new trial. (*McCown v. Spencer, supra,* 8 Cal.App.3d at p. 226)

Given the applicable abuse-of-discretion standard, "all presumptions are in favor of the order granting a new trial [citations], and the order will be affirmed if it may be sustained on any ground [citations], although the reviewing court might have ruled differently in the first instance. [Citations.]" (*Brandelius v. City & County of San Francisco* (1957) 47 Cal.2d 729, 733-734.)

With respect to whether plaintiffs' trial counsel engaged in misconduct that resulted in an irregularity in the proceedings preventing Hughes from having a fair trial, the trial court focused on the plaintiffs' trial counsel's closing argument. The trial court's order and specification of reasons for granting a new trial stated, "The court has highlighted 37 pages out of 100 of inflammatory remarks and 'buzz words' to inflame the jury."

A review of the closing argument of plaintiffs' counsel at the end of the trial's first phase indicates that defense counsel did not object to the portions of the argument that the trial court referred to,[14] and that plaintiffs' counsel made arguments derived from the evidence presented at trial. Significantly, after closing argument, the trial court instructed the jury that the attorneys' statements are not evidence. While plaintiffs'

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[14] In fact, the only objection defense counsel made was when plaintiffs' counsel instructed the jury on the law.

counsel mentioned the word "money" at the close of his rebuttal argument, the word was used only once, in the analogy of a personal injury verdict as "a language called dollars." Given that this was a civil damages case, plaintiffs' counsel's isolated and brief reference to money was not prejudicial.

The trial court also specified that it granted a new trial because it erred in allowing a treating chiropractor to testify that one of the plaintiffs told the chiropractor that "plaintiff would never be able to work again." The court additionally stated it was "error not to instruct the jury that the attorney fees were not included in the award." In view of the entire record, the erroneous admission of hearsay does not merit a vacating of the jury verdicts. As for the absence of the jury instruction at issue, our research shows no case law or BAJI instruction on excluding attorney fees from awards. This is because there is no requirement to instruct juries on excluding attorney fees from their awards.

The errors in law argued in Hughes' motion for new trial amounted to three, excluding any arguments of excessive damages awards. One, Hughes contended it was error to award Lane and Villalpando "front pay" because they rejected unconditional offers of reinstatement made after the liability verdicts were returned.

Two, Hughes argued in a footnote in its memorandum of points and authorities that the trial court erroneously denied Hughes' motion for a mistrial based on juror misconduct. Without a supporting declaration, Hughes stated that the misconduct occurred during deliberations in the final punitive damages phase of the trial. According to Hughes' memorandum of

points and authorities, one juror felt threatened by the receipt of a note stating, "If you decide not to choose, you've already made the wrong choice."[15] Absent evidentiary support, factual assertions made in legal argument cannot stand.

The third legal error argued by Hughes in its motion for new trial was that the trial court improperly admitted evidence of acts before February 1991. However, under the "continuing violations" doctrine, employer practices in violation of FEHA which are systematic or continuing in nature are not precluded just because some of those practices occur prior to the one-year limitation period set forth in Government Code section 12960. (*Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1052; see also *Watson v. Department of Rehabilitation* (19889) 212 Cal.App.3d 1271, 1290-1291; *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 349.)

Since the trial court's grant of a new trial cannot be sustained on the grounds cited by Hughes or the trial court, we hold that the trial court abused its discretion in alternatively ordering the new trial.

III
ARGUMENTS AGAINST EVIDENTIARY RULINGS, JURY INSTRUCTION AND DENIAL OF MOTION TO DISQUALIFY DEFENSE COUNSELMOOTED BY UPHELD JURY VERDICTS

Lane and Villalpando contend the trial court made three evidentiary errors, the exclusion of two experts in

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[15] No other juror misconduct was asserted by Hughes.

the liability phase of the trial, the exclusion of Villalpando's treating psychotherapist and designated expert in the damages phase of the trial, and the admission of certain mitigation evidence in the trial's final punitive damages phase. They also argue that the trial court erroneously instructed the jury that Lane could not recover damages accruing before a certain time. Lastly, Lane and Villalpando maintain that the trial court erred in refusing to grant their motion to disqualify Hughes' defense counsel, the Paul, Hastings, Janofsky & Walker law firm.

Regardless whether or not these contentions have merit, the issues they raise are mooted by our decision to uphold the jury verdicts in favor of Lane and Villalpando. Accordingly, we do not consider the trial court's evidentiary rulings, jury instruction and denial of the motion to disqualify Paul, Hastings, Janofsky & Walker.

DISPOSITION

The judgment notwithstanding the verdicts is reversed, and the cause remanded with directions to enter a judgment heretofore entered on December 23, 1994, for plaintiffs on the jury verdicts, with further directions to modify said judgment to award plaintiff Lane $5 million in punitive damages and plaintiff Villalpando $2,830,000 in punitive damages. Costs on appeal are awarded to appellants.

JOHNSON and WOODS, JJ., concur.

APPENDIX E

APPENDIX "E"

(62 Cal.Rptr.2d 437; 933 P.2d 1134,
62 Cal.Rptr.2d 437)

Supreme Court of California.

Jeffrey LANE et al., Appellants,
v.
HUGHES AIRCRAFT COMPANY, Respondent.
No. S059064.
(Filed March 19, 1997)

Respondent's petition for review GRANTED.

The cause is transferred to the Court of Appeal, Second Appellate District, Division Seven, with directions to vacate its decision and to reconsider the cause in light of *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932- 933, 148 Cal.Rptr. 389, 582 P.2d 980 and *Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710-711, 106 Cal.Rptr. 28, 505 P.2d 220.

GEORGE, C.J., and KENNARD, BAXTER, CHIN and BROWN, JJ., concur.

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GEORGE, C.J., and KENNARD, BAXTER, CHIN and BROWN, JJ., concur.

APPENDIX F

APPENDIX "F"

COURT OF APPEAL - SECOND DIST.
FILED
July 28, 1997
JOSEPH A. LANE, CLERK

(65 Cal.Rptr.2d 889; previously
published at 56 Cal.App.4th 1038)

Court of Appeal, Second District, Division 7, California.

Jeffrey LANE, Plaintiff and Appellant,
v.
HUGHES AIRCRAFT CO., Defendant and Respondent.

David VILLALPANDO, Plaintiff and Appellant,
v.
HUGHES AIRCRAFT CO., Defendant and Respondent.
No. B090258

(Filed July 28, 1997)

Ian Herzog, Evan D. Marshall and Amy Ardell, Santa Monica, for Plaintiffs and Appellants.

Paul, Hastings, Janofsky & Walker, Paul Grossman, Los Angeles, Dennis H. Vaughn, Santa Monica, and George W. Abele, Los Angeles, for Defendant and Respondent.

LILLIE, Presiding Justice.

Jeffrey Lane, an African-American, and David Villalpando, his former supervisor, appeal from a judgment notwithstanding the verdicts and an order alternatively granting a new trial following jury verdicts against plaintiffs' former employer, Hughes Aircraft Co. (Hughes). The jury had found that Hughes racially discriminated against Lane, and retaliated against Villalpando for his refusal to write a poor job evaluation of Lane. Plaintiffs also challenge certain evidentiary rulings excluding expert testimony and allowing, in the trial's punitive damages phase, testimony of Hughes' activities in support of minorities. In addition, plaintiffs contest a jury instruction limiting the period damages are recoverable, and denial of their motion to disqualify defense counsel.[1]

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[1] An opinion in this cause was originally filed on January 6, 1997, and subsequently modified on February 4, 1997. On March 19, 1997, the California Supreme Court granted review, and transferred the case to this court with directions to vacate our decision and reconsider the cause in light of *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 932-933, 148 Cal.Rptr. 389, 582 P.2d 980 and *Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710-711, 106 Cal.Rptr. 28, 505 P.2d 220. On March 27, 1997, we vacated our original opinion filed January 6, 1997. We now consider the cause pursuant to the Supreme Court's directions.

STATEMENT OF FACTS

Hughes is a large aerospace corporation which employs about 50,000 people. In the 1980s and early 1990s, roughly half of its work consisted of classified, defense projects for the federal government, and the other half, nonclassified, commercial projects for private companies.

Hughes' Program Office administers contracts Hughes has with the federal government and with private companies. The Program Office also deals directly and has primary contact with Hughes' customers.

Hughes' Human Resources (HR) Department handles internal employee complaints. In 1987, attorney Susan Goland began working in the HR Department. Her duties included investigating race discrimination claims and defending Hughes against discrimination complaints filed with the federal Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing.

Plaintiffs Lane and Villalpando worked in Hughes' Space and Communications Division, which had between 5,000 and 5,500 employees. This division contained laboratories divided into departments, which in turn were divided into sections.

At Hughes, the management positions started at level 4B, and a section head was an introductory line management position. Spacecraft managers were generally level 4B employees, and operations (Ops) managers were generally ranked higher, at level 4A. The highest management position was at level 1.

Laboratories managers were at level 2.

Employees were periodically evaluated, with a rating of 5 being the lowest performance level below Hughes standards, a rating of 1 being the highest performance level and a rating of 3 meeting Hughes standards.

In 1990 and 1991, Charles Lance Mohler was a level 2 laboratories manager in charge of about 500 employees in four laboratories in the Space and Communications Division, including the 4M Laboratory[2] where Lane and Villalpando worked. Mohler's supervisor was Mal Meredith. Directly under Mohler were assistant lab managers Gavien Miyata, ranked at level 2, and Howard Seeb. Assistant lab manager Hal Solomon reported to Seeb.

Of Mohler's over 50 managers level 4 and above, there were no black managers. None of Mohler's approximately 20 department managers were black; nor were any of the 10 "technical heads," who were below department managers, black. No black department managers or technical heads were proposed for 1992.

A. Plaintiff Lane's Work History Before Villalpando Became His Immediate Supervisor

Lane first worked for Hughes in the summer of 1974 as an assistant engineer while majoring in physics as an undergraduate student at the University of Southern California. At the time, he was 19 years old. He

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[2] The 4M Laboratory was also known as 4M2X.

returned to Hughes in 1977, when he completed almost all his course work to obtain a bachelor's degree.[3] At that time, Lane was an "MTS 1" test engineer, the lowest level 7 technical position.

In 1985, Lane tendered his resignation because the classified, military work he did conflicted with his religious beliefs. However, a manager whom Lane was under convinced Lane to do commercial work for Hughes. Lane then worked in the communication satellite field, performing engineering functions on satellites.

Lane's performance reviews in the 1980s were consistently good. Nevertheless, in 1986, having never before been promoted, Lane had to request a promotion from Robert Ward, his supervisor at the time. Lane received a one- step promotion in 1987, his tenth year at Hughes.

By 1987, Lane was a test director and a group head, positions which a Hughes organization chart indicated should be ranked at level 5. Even though Lane was ranked at no higher than a level 6, he was the highest ranked black employee in Ward's section.

When Lane received a promotion in 1987, he was assigned to the Inmarsat program. The Inmarsat was a communications satellite for ship-to-shore communications.

Lane assumed ever-increasing responsibilities on the Inmarsat, from test director to spacecraft manager in 1988. According to a Hughes chart, a spacecraft manager should be a level 4 position, but Lane was still

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[3] Lane obtained his degree a few years later.

ranked no higher than a level 6.

A performance appraisal from Ward dated December 9, 1988, and written by someone else, commended Lane as an "outstanding Inmarsat team leader" who "is competent, responsive and thorough in performing his tasks. Mr. Lane also possesses the qualities of a good manager.... He is respected by his fellow workers and makes a conscious effort to build team work and morale. [¶] I plan to train and groom Mr. Lane to assume the operations manager role on Inmarsat CM-4."

In early 1989, Lane became the Ops manager on Inmarsat CM-4. Lane asked for and Ward denied Lane a promotion. Consequently, Lane remained a level 6 employee.

Lane contacted the HR Department to complain about race discrimination, but an HR staff member named Mark said there was no discrimination.

Thereafter, on February 2, 1989, Lane wrote a memorandum to Robert Farmer, Lane's department manager at the time. Lane stated that in the middle of his eleventh annual performance appraisal, he felt "compelled to respond to a chronic under-evaluation of my efforts.... [¶] ... However, in discussing this issue with my immediate supervisor, Mr. Ward appears unable and/or unwilling to objectively assess my job performance against my overall rating and put forth the necessary effort to rectify this disparity. Therefore, I appeal to the integrity of higher authority for a rational review of this matter."

Following the February 2, 1989 memorandum, Lane received a raise in two allotments.

Two months after the memorandum, Ward rated

Lane lower than before. Instead of giving Lane a "2" performance rating, Ward rated Lane at a "3," merely meeting Hughes standards.

In 1989, Lane additionally worked on the "Consolidated Test Laboratories" or "CTL" program, and was the test director of the KU Band. CTL was a plan to consolidate testing for equipment returned from Space Shuttle flights in a single organization. The KU Band was the radar and communications system for the space shuttle. Mohler's staff was responsible for testing the deployed assembly of the KU Band, while other organizations handled manufacturing parts.

In performing his CTL and KU Band tasks, Lane worked under James Samis, a level 5 employee. As Samis was only supposed to be a temporary Ops manager for the CTL program, Samis groomed Lane to replace him.[4]

In 1989, Samis wrote in Lane's performance evaluation that Lane "has taken on the KU Band test direction tasks in the last couple of months and has performed very well in the limited operations and time available in conjunction with his Inmar Sat duties."

Samis voluntarily left the CTL program in 1990. In preparation of his departure from the program, Samis recommended in writing that Lane "continue to be the responsible person from Division 4M for overseeing

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[4] On direct examination for the defense, Samis did not deny grooming Lane to become the KU Band's Ops manager, but testified that he did not recall doing so.

daily activities on D.A. testing"[5] and that Howard Seeb "be the contact point for all CTL issues at this time."

After Samis transferred from the CTL program, Lane was in charge of the KU Band project for Mohler's laboratory, and he remained the test director. Occasionally referred to as an Ops manager, Lane lacked the official job title.

Before Samis left the CTL program in 1990, he was briefly part of an Ops and spacecraft managers organization formed by Mohler that same year. Lane, however, was left out of the group.

B. Events Beginning in Spring 1990 When Villalpando Became Lane's Supervisor

In March or April 1990, Villalpando became acting "RF" Section Head under Solomon, who interviewed Villalpando for the position. As such, Villalpando became Lane's immediate supervisor. Solomon selected Villalpando over Lane because Solomon felt Villalpando had a stronger technical background than Lane and because Villalpando was cleared to work on commercial and classified spacecraft.

Villalpando, a level 5 employee, has a B.S. and an M.S. in electrical engineering.

Thinking it unusual for Lane to be a level 6 employee because he had the responsibilities of a level 4 Ops manager, Villalpando asked Lane why he was not a higher level than 6. Lane answered that it was

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[5] The phrase "D.A. testing" referred to deployed assembly.

because of his race. Villalpando then approached Solomon, who said he did not know why Lane was not in Mohler's organization for Ops and spacecraft managers, but that he would look into the matter.

About a month later and then about a month or so afterward, Villalpando approached Solomon again to find out why Lane was not in Mohler's group. Each time, Solomon responded that he was looking into the matter.

By around November 1990, Lane began to feel he was not wanted on the KU Band program because he was excluded from key meetings. Some of these meetings were held for Mohler's organization created that same year.

In the end of 1990 or beginning of 1991, when raises and promotion requests were made, Villalpando ranked Lane as the first on his list requesting promotions because Villalpando considered Lane one of his "top notch" employees. Working directly with Lane, Villalpando found him to be a superior performer who was well-liked. Mohler, under whom Lane had worked, likewise considered Lane a valued employee who did a good job.

Villalpando also recommended another black employee in his section, Rick Story, for promotion. Story received the promotion.

Solomon agreed with Villalpando's recommendation to promote Lane. However, nothing happened.

In February 1991, on behalf of Mohler's laboratory, Lane led negotiations with the Program Office for the maintenance and repair of the KU Band project. Villalpando assisted Lane. Throughout the negotiations, Lane and Villalpando followed Mohler's advice.

Mohler was not dissatisfied with Lane's and Villalpando's work in this area.

Around this time, Villalpando gave Lane an award for his superior performance on the KU Band. The award was issued by the Program Office, and signed by then- Program Manager Richard Johnson.

Johnson was later replaced by his assistant program manager, David Steele, in April 1991.

Meanwhile, a dispute arose between the Program Office and Mohler's staff negotiating for the CTL. The customer wanted less resources used than what Lane thought necessary to do the job satisfactorily.

While negotiations were ongoing, the Program Office told Mohler that it wanted to negotiate with someone possessing a higher rank than Lane.

On April 23, Steele told Mohler that Lane needed to be replaced. By the end of April, Mohler took Lane off the KU Band.

Lane learned of his removal from his successor, level 3 Lab Manager Jan Sikola, who was previously Mohler's assistant on the original KU Band project. At some point in time, Meredith called Villalpando to explain that Sikola replaced Lane because Sikola was better qualified than Lane as a result of Sikola's year of experience on the KU Band program.

In violation of Hughes' normal procedure for a removed employee to receive a transition plan, no such plan was made for Lane. Consequently, after Lane trained Sikola, he had nothing to do.

Sikola brought a level 4A assistant, Section Head Jack Collins, with him. Sophie Neberling, who worked in a laboratory run by Sikola, took over the CTL negotiations. Steele dealt with Neberling, and to some

extent Collins and Sikola. Eventually, two level 4 employees replaced Sikola and Collins. None of Lane's replacements were black. One of Lane's successors was a level 4 employee without a bachelor's degree.

When Lane asked Mohler, Solomon and Seeb why he was pulled off the KU Band, all three responded it was not a performance issue. They told Lane that they had big plans for him and that he was a valued employee. None of them gave Lane a reason for his removal, although Mohler mentioned Steele.

Knowing it can be distressing for a displaced employee not to have a transition plan, Mohler expected Sikola to at the minimum assist in making a transition plan for Lane. However, Sikola did not do so, expressing concern to Mohler about Lane's and Villalpando's performance. Mohler relayed to Sikola his dissatisfaction with Sikola's failure to find a job for Lane, but did not document his displeasure.

Following Miyata's suggestion, Lane went to the HR Department, where he orally complained about race discrimination.

Later, on May 17, 1991, Lane brought Goland a written internal complaint after he understood that Goland would do nothing until she received a written complaint. Before submitting the complaint, Lane expressed concern not to upset individuals who might retaliate against him, and requested Goland not contact his middle or lower management. After Goland agreed to investigate outside Lane's management, Lane submitted the complaint. In the complaint, Lane alleged that unlike with non-black employees, it took him 10 years to receive his first promotion despite outstanding performance evaluations.

After Lane filed his complaint, he developed chronic fatigue. Lane went on a temporary leave as of May 22. While Lane was on leave, Meredith telephoned him on May 23, 24 or 25 to tell Lane to return to work.

On May 24, 1991, Meredith called Mohler to tell him the situation with Lane was critical, and that Mohler needed to find Lane a job right away. In response, Mohler asked Steele to write a letter.

In a letter dated May 29, 1991, Steele compared Sikola with Lane and Villalpando, and was critical of Lane. This was the first criticism that Villalpando knew regarding Lane.

After Mohler received Steele's letter, he told Miyata, Seeb and Solomon that Meredith wanted them to transition Lane immediately. Mohler assigned Solomon the task of getting Lane a job.

In early June 1991, Villalpando met with Goland and Solomon. During the meeting, Goland expressed regret that Meredith telephoned Lane at home because it would look bad in court, and "she started talking about firing Jeffrey for insubordination for refusing assignments..." Villalpando got the impression that Goland wanted him to document Lane's work performance.[6] Miyata thought Goland discussed documentation in a general way.

Around the same time, Solomon was first advised of a possible problem with promoting Lane. The problem was that the promotions guidelines were made "somewhat more restrictive" in that Lane first needed to

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[6] Goland denied directing Villalpando or anyone to document poor performance from Lane.

earn more before he could be eligible for the promotion that Villalpando recommended.

When Lane returned to work in early June 1991, no one had any concrete job offer, even though Lane asked Seeb and Mohler for assistance in finding a management position. Lane did not get any career opportunity booklets, which periodically were supposed to list openings.

Around June 17, 1991, Lane met with Goland to give her additional documentation and express concerns of retaliation for filing the complaint. Goland seemed to discount Lane's concerns, and he got the impression that Goland was not going to do anything about his retaliation claim.

In mid-June 1991, Villalpando contacted Goland who instructed Villalpando to document Lane's poor performance.

Not until June 22, 1991, did Solomon offer Lane a spacecraft manager position. Lane considered this position a mere hypothetical position and a demotion in responsibilities because he was previously a spacecraft manager. Lane told Solomon that he wanted his career to move forward. Solomon told Lane that the spacecraft position was not a lesser position, that Lane would be responsible for managing more people, and that the budget would be about eight times greater than Lane's prior budget.

On June 22 Solomon also suggested that Lane speak to manager Jerry Hatch about a short-term position entailing writing proposals for new business. Lane did not express interest in the job.

Meanwhile, Villalpando talked to Mohler, Solomon, Seeb, Miyata and Steele about the lack of a transition

plan for Lane. Villalpando received vague responses to his questions, and was told that "big plans" were in store for Lane. Villalpando was also told that Lane did not receive a promotion because he did not earn enough to get promoted. This was the first time Villalpando heard such an excuse for denying an excellent employee a promotion.

Unsatisfied with the responses, Villalpando called Meredith, a level 1 employee, to discuss the discrimination against Lane. Villalpando contacted Meredith because in a meeting held probably in 1989 Meredith expressed concern over the lack of minorities in Hughes' management levels. Villalpando also contacted Meredith because there was still no transition plan for Lane.

Meredith told Villalpando that Hughes decided to make Lane assistant departmental manager to William Phillips, whose laboratory James Bradley ran as of June 1991. Bradley, in turn, reported to Mohler.

Contrary to what Meredith said, Bradley had no intent of assigning any assistant managers. Bradley only offered Lane a temporary job lasting three to six months, and this position had nothing to do with line management.

Sometime in late June 1991, Solomon told Lane he was assigned to work as Phillips' assistant manager, even though Hughes was eliminating the assistant manager position.[7]

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[7] At some point in time, Phillips told Solomon he thought it was misleading and unfair to give Lane the impression he would be Phillips' assistant manager, since

In early July 1991 Lane began working for Phillips. Lane told Phillips about his chronic fatigue, and that he could not work certain evenings because of his church commitments. Although Lane was still organizationally under Villalpando until the transfer would occur, Villalpando was told that he was no longer Lane's supervisor.

At one of Phillips' weekly meetings, which Bradley rarely attended,[8] Phillips introduced Lane and explained what his role was to be. In addition, Phillips made sure in informal conversations that staff understood what Lane's role was. In initial meetings between Phillips and Lane, no one mentioned Lane would be called assistant manager.

Lane was instructed to have test engineers write satellite testing procedures. This assignment was difficult for Lane's predecessors because they had to compete with others for the test engineers' time. Almost initially Lane requested that he be included on the organization chart to notify the test engineers that he had authority to supervise them. However, Lane's request was not honored.

Not being transferred organizationally under Phillips was difficult for Lane because he had to tell a lot of people what to do, yet he was not on the organization chart showing those people had to report

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Hughes no longer had such a position.

[8] Bradley disagreed.

to Lane.[9] Lane was not even on the department's "loan list" naming employees working in the department but officially listed in other departments.

Bradley told Phillips that he was dissatisfied with Lane's work.

In late summer of 1991, Hughes reorganized the laboratories, thereby opening up a new line management position. This reorganization was planned beforehand. Yet nobody asked Miyata to give Lane a position in any of the new positions resulting from the reorganization.

Sometime in the summer of 1991, Ed McFarlane, who worked as Phillips' RF Section Head, told Villalpando that upper management agreed to remove some of Villalpando's responsibilities. Then lower management told Villalpando he was going to get more responsibilities. At the same time, Villalpando was starting to receive negative input regarding Lane. Villalpando felt that the negative comments were made in an attempt to change his opinion about Lane.

As of August 20, 1991, Villalpando had a staff of about 45 people, while McFarlane had a staff of about 10 people.

In the late summer of 1991, at a presentation before about 10 or 15 people, McFarlane told Villalpando that upper management approved McFarlane to take over some of Villalpando's responsibilities. Solomon was involved in the decision to select McFarlane as head of

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[9] Even in an organization chart dated as late as October 25, 1991, Lane was shown as under Villalpando instead of Phillips.

the newly created RF Department. At the time, McFarlane required additional clearance to fully manage the department.

Unhappy with his encounter with McFarlane, Villalpando talked to Solomon, who assured Villalpando he would receive more responsibility. Villalpando initially accepted a position in the new RF Department whereby he would continue to be responsible for the government portion of the RF activity but would have less responsibilities than before.

In September 1991, Solomon told Lane about another spacecraft opening.

That same month, Solomon spoke with Villalpando about Bradley's opinion that Lane did not show enough leadership or initiative.

On September 30, 1991, Goland scheduled a meeting with Solomon and Miyata to discuss her conclusions following her investigation of Lane's HR complaint. During her investigation, Goland had found that it took an average of five years for a select group of employees to receive a promotion. She found that Lane took the longest in getting a promotion. Although Goland did not know why it took Lane so long to get a promotion, she considered the fact that most people hired out of school had engineering degrees, and Lane had a physics degree. Goland noticed that Lane's early performance appraisals encouraged Lane to take engineering courses, but she could find no such courses in his record.

Despite assuring Lane that she would not contact his management while conducting her investigation of his complaint, Goland got information from Miyata and

Solomon. Miyata, however, only had a peripheral knowledge of the KU Band project, never worked with Lane on any project and did not know his work performance or job title. Goland never spoke with Villalpando about whether Lane should be promoted in 1991.

Goland did not make it part of her investigation to determine whether in general black employees of Hughes were discriminated against in positions similarly situated as Lane. Nor did she try to find out how many blacks were in higher levels than Lane to determine whether Lane was underpaid and underpromoted as a result of his race. She considered such an investigation unnecessary.

In investigating Lane's race discrimination claim, Goland did not go to Hughes' affirmative action office. Having never worked in that office, Goland did not understand how affirmative action statistics were kept. Nevertheless, Goland considered company-wide information irrelevant.

During her investigation, Goland discovered a white project engineer with the same title as Lane. The white employee also had a physics degree, had been with Hughes the same length of time as Lane, and was earning the same amount. However, the white employee got his first promotion in less than five years.

At the September 30, 1991 meeting, Goland asked Solomon and Miyata what they would do to resolve Lane's HR complaint. She also discussed the results of her investigation of the complaint, and her conclusion that there was no discrimination. Right after the meeting, Miyata overheard Bradley mention Lane's poor performance.

Soon after the September 30, 1991 meeting, Villalpando told Lane that Bradley was criticizing Lane's performance. Around this time, Lane was denied three promotion opportunities. These opportunities included promoting Lane to become Phillips' assistant department manager, and giving Lane a position he had held which became elevated to a level 5 position. The denial of the latter opportunity occurred publicly at a meeting.

In early October, Goland gave Lane her findings of no discrimination against him.

On October 1, 1991, Miyata told Villalpando to talk to Bradley because Miyata heard Bradley had performance problems with Lane. Miyata instructed Villalpando to document those problems, and not to talk to Phillips even though Lane was Phillips' assistant.[10]

Villalpando documented what Bradley said. Villalpando then wrote to his department manager, Don Rath, a level 4 employee without a bachelor's degree, that Lane "has not worked up to his potential since April. He could have provided better leadership for the 601TP effort."

Notwithstanding Miyata's order not to talk to Phillips, Villalpando approached Phillips about eight items that Bradley listed regarding Lane's performance. Phillips contradicted six items, stating they were either not Lane's responsibilities, Phillips never asked Lane to do them, or they were very low priorities. Of the

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[10] Miyata denied telling Villalpando not to talk to Phillips.

remaining two items, one item involved a huge task in which maintaining accuracy was difficult, but Phillips felt Lane did the best he could. The other item was Lane's lack of good leadership over people whom Lane had no supervisory control in the organization chart. Phillips opined that Lane met Hughes' performance standards.

Soon after meeting with Villalpando, on October 3, 1991, Phillips met with Bradley and Lane to discuss his work performance.

Bradley discussed where he felt Lane did not meet expectations given Lane earlier in the year. They discussed what role Lane should have, and agreed that this was not a long-term job.

After Villalpando told Miyata about his conversation with Phillips, Miyata instructed Villalpando to write Lane a reprimand for poor performance. Miyata remarked, "Dave, come on man, we are having a tough time deciding between you and Ed [McFarlane], we are looking for one of you to step forward and show that you got what it takes to be a department manager."[11]

Solomon also told Villalpando that Hughes was deciding whether to combine McFarlane's 10 employees with Villalpando's 45 employees, and, if so, whether McFarlane or Villalpando should be department manager.

At one time, Miyata told Villalpando that he had annoyed many people, including Mohler and Meredith, because of his support of Lane.

Feeling pressured by Miyata and Solomon,

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[11] Miyata denied making such a statement.

Villalpando rated Lane's performance as a "3," meeting Hughes standards.

Thereafter, Villalpando encountered Goland and Meredith once outside the building where Villalpando worked. Goland told Villalpando, "I hear you are having performance problems with Jeffrey Lane." Villalpando replied, "That's what Bradley said." Then Goland remarked, "Well, make sure you document it, we're going to need it some day in court." After Villalpando responded that he "wrote everything down," Goland commented, "Isn't it great to see Dave coming around, who would have thought Jeff's strongest supporter would turn on him."[12]

Because Lane was supposed to be transferred under Phillips as of the summer of 1991, Villalpando did not include Lane on Villalpando's promotions list for 1992 promotions. Relying on Villalpando's documentation of Bradley's eight-item list criticizing Lane, and Villalpando's mediocre rating of Lane, Miyata made the final decision to deny Lane's promotion. Solomon was involved in the decision.

On October 16, 1991, Villalpando approached Phillips to request that Lane be transferred and promoted to assistant department manager. Phillips did not object to Villalpando's request.

When Villalpando relayed to Miyata his October 16 conversation with Phillips, Miyata expressed anger at Villalpando's continued support of Lane, and warned Villalpando to never talk about promotions for Lane again.

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[12] Goland denied making such a comment.

Thereafter, in late October 1991, McFarlane informed Villalpando that McFarlane was going to be the new RF Department manager. Initially, Villalpando was told he was going to work for McFarlane. Villalpando repeatedly asked to meet with Mohler and Miyata, but was told there would be no meeting until Villalpando decided whether he was going to walk away from the rest of his responsibilities.

On October 30, 1991, Solomon told Villalpando in the parking lot that Mohler and Miyata did not want Villalpando around.

After Villalpando decided to give up his remaining duties, Mohler grilled Villalpando in the first week of November 1991 whether to promote Lane. Villalpando tried to avoid answering, and said, "I think I'm not going to buck my upper management anymore."

On November 4, 1991, Mohler learned that Lane was not officially under Phillips. Mohler discussed with Solomon how it would appear that Hughes retaliated against Lane for filing an HR complaint. Mohler instructed Solomon to transfer Lane now, but Solomon did not comply. He also involved Miyata and Seeb.

By November 7, 1991, McFarlane was given all Villalpando's accounts, and Villalpando lost all his responsibilities.

On November 8, 1991, Mohler met with Villalpando. In the past few weeks before the meeting, Miyata, Seeb and Solomon had spoken to Mohler about Villalpando with respect to Lane. At the November 8 meeting, Mohler asked Villalpando whether he believed Lane was discriminated against. Villalpando appeared to be nervous. At the time, Mohler knew McFarlane instead of Villalpando became the RF Department manager.

After meeting with Villalpando, Mohler decided not to overrule the denial of a promotion for Lane. Mohler based his decision on Villalpando's failure to provide sufficient evidence to overrule the denial of a promotion.

In a letter dated November 11, 1991, Villalpando explained that his responses during Mohler's grilling on November 8 were made under duress.

On November 19, 1991, Goland wrote a report dismissing Lane's discrimination claim. She discounted his high performance ratings in the 1980s, stating that "ratings frequently were inflated during that period." Goland further wrote that she could not decide why Lane was not promoted for more than 10 years.

In December 1991 Phillips and Bradley offered Lane a non-management position as a test engineer in their department.

Villalpando chose to work with Martin Short, a trusted friend. Villalpando was offered multiple spacecraft manager jobs, which were lateral positions, and a quality assurance position which would have been a promotion. He declined these offers because the jobs were not under Short and because Short told him that Short heard there were going to be a lot of layoffs in the Quality Assurance Department.

With no substantial tasks for about a four-month period, Villalpando researched the number of black employees in management positions at Hughes. Around the time Lane began having problems with management, only one black employee, Ron Williams, was suddenly promoted to a level 5 effective April 27, 1991.

After Short told Villalpando that he was not going to

support Villalpando, Villalpando began calling lawyers to find out what his rights were. In March 1992, Villalpando telephoned the Paul, Hastings, Janofsky & Walker law firm on a Friday. Villalpando was transferred to a female attorney, who asked him to detail what happened to him and Lane. Then the attorney told Villalpando that she worked for Hughes, and abruptly hung up.

The next Monday, Hughes' in-house counsel Warren Jackson asked Villalpando if he was "the Dave Villalpando that's been calling lawyers?" Jackson told Villalpando that if he had a problem with Hughes, Villalpando should go to HR.

Following his conversation with Jackson, Villalpando ran out of the building, and never returned to his job. At the time, Villalpando's wife was seven and a half months pregnant.

Pursuant to a letter written by Steve Dorfman, President of the Space and Communications Division, inviting staff to call Dorfman if they could not resolve a problem, Villalpando tried contacting Dorfman.

When Villalpando finally met with Dorfman, both men had attorneys accompanying them. Hughes Vice President Tom Goley was also present.

In January 1992, Lane took a medical leave of absence due to the deterioration of his health, and he never returned to his job.

The next year, on January 18, 1993, Villalpando began a new job in the aerospace industry. Villalpando earned more at the new job than at Hughes.

STATEMENT OF PROCEDURAL HISTORY

On February 24, 1993, Lane filed in superior court a complaint against Hughes. His causes of action included race discrimination in violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq.

In June 1993, Villalpando filed a separate complaint against Hughes.

Lane amended his complaint several times, finally filing a third amended complaint on November 12, 1993.

Both Lane and Villalpando asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and retaliation in violation of FEHA. In addition, Villalpando claimed constructive discharge.

Hughes answered Villalpando's complaint on July 23, 1993, and Lane's third amended complaint on January 24, 1994.

On March 31, 1994, the Superior Court consolidated Lane's and Villalpando's actions.

On August 17, 1994, Hughes filed a motion in limine to exclude the testimony of Karlene Roberts and Russell Cunningham, whom plaintiffs designated as experts on discrimination, retaliation, and employers' human resources practices, procedures and policies. Hughes made the motion on grounds that Roberts and Cunningham are not qualified to testify, and that their proposed testimony is irrelevant and prejudicial.

Over Lane's and Villalpando's opposition, on September 7, 1994, the trial court prohibited Roberts

and Cunningham from testifying on the ultimate issues of retaliation and discrimination on the ground that such testimony would invade the province of the jury. The court questioned Roberts' qualifications as an expert.

The case was tried in three phases, first liability, then all damages except punitive damages and last, punitive damages.

At the conclusion of the closing arguments at the liability phase, the trial court on September 29, 1994, orally instructed the jury. The court explained that to prevail against Hughes, Lane and Villalpando need only prove one of their two bases of liability, breach of employment contract and violation of FEHA.

The court quoted portions of subdivisions (a), (f), (g), (h) and (i) of Government Code section 12940. This statute makes it an unlawful employment practice "(a) For an employer, because of the race ... of any person, ... to discriminate against the person in compensation or in terms, conditions or privileges of employment .... [¶] ... [¶] (f) For any employer ... to ... discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part. [¶] (g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so. [¶] (h)(1) For an employer ... because of race ... to harass an employee.... Loss of tangible job benefits shall not be necessary in order to establish harassment .... [¶] (i) For an employer ... to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

The trial court further instructed that if Lane offers evidence that Hughes treated him differently because of his race, and if Hughes produced evidence that it had legitimate, nondiscriminatory and nonretaliatory reasons for its actions, then Lane may rebut Hughes evidence by "either directly showing that a discriminatory reason more likely was involved or indirectly by showing that the employer's explanation lacks credibility or is untrustworthy and not worthy of belief. [¶]... The burden is always on the plaintiff to prove by a preponderance of the evidence that defendant discriminated against him because of his race." The court explained that Lane need not prove race was the sole or even dominant factor influencing Hughes to take adverse employment action. Instead, Lane "need only show that there was a causal connection between plaintiff's race and the company's adverse employment action."

On October 4, 1994, the jury returned verdicts for Lane and Villalpando on the liability stage. The jury found that Hughes breached its employment contract with Lane requiring termination only for good cause, constructively discharged Villalpando in breach of its employment contract with Villalpando, breached the implied covenant of good faith and fair dealing, discriminated against Lane because of his race, and retaliated against Lane and Villalpando because they reported the discrimination. The jury also found that Lane and Villalpando proved by clear and convincing evidence that Hughes was guilty of malice, oppression, fraud or despicable conduct.

A polling of the jury showed the jurors were unanimous in reaching their findings.

On October 6, 1994, the trial court heard Hughes' motion in limine to exclude the testimony of licensed social worker Victoria Dellaverson, Villalpando's treating psychotherapist, on the grounds that she is not qualified to testify as a psychoanalyst, and that her proposed testimony is irrelevant and prejudicial. The trial court granted the motion.

During the second phase of the trial, the plaintiffs' family members testified. Lane's treating psychiatrist, David Friedman, M.D., Ph.D., testified about Lane's depression. Economist Joyce Pickersgill, Ph.D., testified on behalf of Lane and Villalpando.

On October 13, 1994, after closing arguments on all damages except punitive damages, the trial court instructed the jury, among other things, that it may not award plaintiffs economic or noneconomic damages for Hughes' conduct before February 1, 1989.

On October 18, 1994, the jury awarded Lane $295,000 for lost wages and other economic damages to his date of termination, $2.3 million for loss of wages and work-related benefits after October 6, 1994, and $3.5 million for emotional distress and other noneconomic damages. Villalpando was awarded $125,000 for lost wages and other economic damages through October 6, 1994, after subtracting all wages and work-related benefits that Villalpando may have received from any other employer and any loss of wages or work-related benefits that Villalpando may have sustained due to his failure, if any, to take reasonable efforts to seek comparable employment. The jury also awarded Villalpando $1.3 million for future loss of wages and work-related benefits after October 6, 1994, and $2 million for emotional distress and other noneconomic

damages.

The jury was polled, and the jurors were unanimous on all findings except two jurors disagreed with the $3.5 million award for Lane's noneconomic damages.

Thereafter, the third phase of the trial on punitive damages commenced. During this phase, Hughes stipulated that there was no written evidence of any reprimand or discipline taken against Solomon, Miyata, Goland and Mohler.

Only one witness testified in the trial's last phase. This witness, David Barclay, was vice president of Hughes' work force diversity. Over plaintiffs' objection, made in a trial brief dated October 13, 1994, to any evidence that Hughes reformed its conduct for the purpose of mitigating its liability for punitive damages, Barclay testified about Hughes' programs to benefit minorities. These programs included Hughes' involvement in schools to encourage minorities to study mathematics and science. Barclay testified that in January 1993 Hughes changed its internal grievance procedure. He also testified that at the time of trial, Hughes had seven black vice-presidents. On cross-examination, Barclay said that the first time he heard about Lane's and Villalpando's lawsuits was after the jury returned its verdicts.

On October 24, 1994, the jury reached two verdicts on the trial's last phase. The jury awarded each plaintiff $40 million in punitive damages against Hughes. A polling of the jury showed the jurors were unanimous in finding punitive damages should be awarded, but that two jurors did not agree with the amount of damages.

Following the entry of verdicts, the law firm of Paul,

Hastings, Janofsky & Walker associated into the action as Hughes' co-counsel. Previously, only the law firm of Arter & Hadden was Hughes' attorney of record.

On November 9, 1994, Hughes moved for a judgment notwithstanding the verdicts. Hughes also filed a notice of intention to move for a new trial or alternatively a remittitur.

Lane and Villalpando moved to disqualify the law firm of Paul, Hastings, Janofsky & Walker as defense counsel.

On December 15, 1994, the trial court heard all three motions, granted Hughes' motion for a judgment notwithstanding the verdicts, alternatively granted its motion for a new trial and denied plaintiffs' motion.

The trial court thereafter entered a judgment for Hughes notwithstanding the verdicts on December 23, 1994.

DISCUSSION

Lane and Villalpando first appeal the judgment notwithstanding the verdicts, and next the alternative grant of a new trial. They then raise issues regarding the trial court's exclusion of their experts, Roberts and Cunningham, the exclusion of Villalpando's psychotherapist, Dellaverson, the admission of Barclay's testimony at the trial's punitive damages stage, the jury instruction that Lane could not recover damages accruing before a certain time, and the denial of their motion to disqualify the Paul, Hastings, Janofsky & Walker law firm as Hughes' counsel. We first consider the judgment notwithstanding the verdicts, as resolution of this matter determines

whether it is necessary to consider most of the remaining matters contested by appellants.

I
SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICTS

"In passing upon the propriety of a judgment notwithstanding the verdict, appellate courts view the evidence in the light most favorable to the party who obtained the verdict and against the party to whom the judgment notwithstanding the verdict was awarded. [Citations.] In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546, 138 Cal.Rptr. 705, 564 P.2d 857.)

A. The Judgment Notwithstanding the Verdict on Lane's Race Discrimination Claim

Lane's third amended complaint asserted in part that Hughes violated FEHA by treating him less favorably as a black man than employees of other races.

Where, as here, disparate treatment based on race is alleged, "the plaintiff must prove the ultimate fact that the defendant engaged in intentional discrimination." (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748, 52 Cal.Rptr.2d 620, citing *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407, *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 and *McDonnell Douglas Corp. v. Green*

(1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.)

Race discrimination cases are subject to a three-step analysis. "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' [Citation.] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. [Citation.]" (*Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at pp. 252-253, 101 S.Ct. at 1093.)

Hughes contends that in applying the third step for analyzing a disparate treatment case, one can use only three types of specific and probative evidence to prove that the employer's legitimate, nondiscriminatory reason for making an employment decision is in fact a pretext for race discrimination. Citing Schlei and Grossman, Employment Discrimination Law (2d ed.1983, Supps.1989 and 1991) page 1314, Hughes states the three types of evidence are (1) direct evidence of discrimination, such as discriminatory statements or admissions; (2) comparative evidence; and (3) statistics.

In arguing for limiting the evidence, Hughes cites *Miles v. M.N.C. Corp.* (11th Cir.1985) 750 F.2d 867, 870 and *Penk v. Oregon State Bd. of Higher Edn.* (9th Cir.1987) 816 F.2d 458, 462 as support. However, while these two federal opinions list the same three types of evidence, they significantly do not hold that these are

the only types of evidence available to prove pretext. Rather, both federal cases state that these three types of evidence "can" be used, thereby suggesting the availability of other types of evidence.

In fact, it is well established that indirect or circumstantial evidence may be used to show discrimination. (*Heard v. Lockheed Missiles & Space Co., supra*, 44 Cal.App.4th at p. 1749, 52 Cal.Rptr.2d 620.) Accordingly, "[i]f the employer successfully rebuts the presumption raised by the prima facie case, 'the McDonnell/Burdine presumption "drops from the case" and the factfinder must decide upon *all of the evidence* before it whether defendant intentionally discriminated against plaintiff. [Citation.] In short the trier of fact decides whether it believes the employer's explanation of its actions or the employee's.' [Citation.]" (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 664, 8 Cal.Rptr.2d 151, italics added.)

Hughes further contends that Lane failed to show a causal connection between Lane's protected status as a black person and Hughes' treatment of Lane. As Hughes correctly points out, the plaintiff must prove by a preponderance of the evidence a causal connection between the plaintiff's protected status and the adverse employment decision. (*Clark v. Claremont Univ. Center, supra*, 6 Cal.App.4th at p. 665, 8 Cal.Rptr.2d 151.)

However, Hughes inappropriately compares *Gonzales v. MetPath, Inc.* (1989) 214 Cal.App.3d 422, 262 Cal.Rptr. 654 to the present action. In that case, Helen Gonzales sued her employer, MetPath, Inc., for discriminating against her because of her Mexican-American heritage and her gender. MetPath

moved for and was granted summary judgment. The appellate court affirmed, concluding that Gonzales "did not even establish a prima facie case" of discrimination. (*Id.* at p. 426, 262 Cal.Rptr. 654.) In contrast, it is uncontested that Lane set forth a prima facie case of discrimination. Therefore, *Gonzales* is distinguishable from the instant action.

Hughes also erroneously argues that the judgment notwithstanding the verdict was supported by the lack of evidence that Steele, Phillips or Bradley was biased against Lane. However, a plaintiff need not prove that every representative of an employer intentionally discriminated against the plaintiff. (*Clark v. Claremont University Center, supra*, 6 Cal.App.4th at p. 668, 8 Cal.Rptr.2d 151.) What matters in a disparate treatment case is "whether a particular individual was discriminated against and why." (*Heard v. Lockheed Missiles & Space Co., Inc., supra*, 44 Cal.App.4th at p. 1756, 52 Cal.Rptr.2d 620.)

In *Clark, supra*, Reginald Clark sued Claremont Graduate School for race discrimination after being denied promotion and tenure. (*Clark v. Claremont University Center, supra*, 6 Cal.App.4th at p. 643, 8 Cal.Rptr.2d 151.) Claremont hired Clark in 1979 as an assistant professor in the education department for a three-year term, and renewed his contract in 1982 for another three-year term. According to Claremont's rules on staff appointments, promotions and tenure (APT), a full-time faculty member may not serve without tenure for more than seven years, including credited experience. Clark requested tenure in his fifth year at Claremont. While his departmental review resulted in a five-to-three vote for Clark, the former and

current department chairmen voted against him. At the second level of review, the APT committee voted against Clark by a four-to-one vote. Clark appealed to Claremont's president, who upheld the APT committee's decision. (*Ibid.*)

Quoting *Roebuck v. Drexel University* (3d Cir.1988) 852 F.2d 715, 727, the court in Clark stated, " 'It is true that University guidelines and witness testimony support [Claremont's] claim that each successive evaluator performed a de novo review of [Clark's] candidacy. Nevertheless, it is also uncontroverted that at each stage of the process the evaluator had available *and considered* the reports and recommendations of each previous evaluator.... Hence it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decision-making process and thus allowed discrimination to infect the ultimate decision.' " (*Clark v. Claremont University Center, supra*, 6 Cal.App.4th at pp. 665-666, 8 Cal.Rptr.2d 151.)

Roebuck, supra, was further quoted, "'once the jury concluded that a particular rating decision at any given level was motivated by discrimination and would have come out differently but for that discrimination, the jury was also free to infer that that discrimination infected other decisions concerning the very same candidate and made at the very same time.'" (*Clark v. Claremont University Center, supra*, 6 Cal.App.4th at p. 667, 8 Cal.Rptr.2d 151.)

Relying on *Roebuck, supra*, the Clark court held that the Claremont president's independent investigation and review of Clark's case "does not insulate Claremont from liability as a matter of law." (*Clark v. Claremont*

University Center, supra, Cal.App.4th at p. 669, 8 Cal.Rptr.2d 151.)

As recognized in *Clark, supra,* quoting *Roebuck, supra,* individual employment decisions should not be treated as a " 'watertight compartment' " with discriminatory actions " 'sealed off from (that is, irrelevant to) every other decision. In the real world ... human beings (including triers of fact) are not compelled to reason that way.' " (*Clark v. Claremont University Center, supra,* 6 Cal.App.4th at p. 667, 8 Cal.Rptr.2d 151.)

Therefore, even if Steele, Phillips and Bradley were not biased against Lane because of his race, as long as the resulting employment decisions to remove him from the KU Band and to not promote him resulted from race-based bias, the judgment notwithstanding the verdict is erroneous.

Hughes compares Lane to the plaintiffs in *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 237 Cal.Rptr. 884 and *Moore v. Eli Lilly & Co.* (5th Cir.1993) 990 F.2d 812 in that Hughes maintains Lane complains of multiple unfair acts but shows no causal connection between his race and those acts. However, *Mixon* and *Moore* are factually distinguishable.[13]

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[13] Following oral argument on December 5, 1996, Hughes called our attention to *Nidds v. Schindler Elevator Corp.* (9th Cir.1996) 103 F.3d 854. There, the federal appellate court affirmed a summary judgment for the defendant-employer in an action based on alleged age discrimination and retaliation asserted under California law.

Unlike Lane's supervisors and management, Robert Mixon's supervisor, who interviewed him for his job as a union representative in the union's Stockton office and later fired him for refusing to relocate in order to reduce the union's expenses, was black, as well as one of the vice presidents. (*Mixon v. Fair Employment & Housing Com., supra*, 192 Cal.App.3d at p. 1320, 237 Cal.Rptr. 884.) All of Lane's supervisors and management were not black.

When interviewed, Mixon was told he would be required to relocate if his commute interfered with his work. Unlike Lane, Mixon was a new employee of less than one year whose employment was subject to the contingent requirement that he relocate. Mixon was repeatedly told to relocate and was notified as early as the first month after starting work that his travel expenses were too high for the union's Stockton office. Although Mixon offered evidence of several white union representatives who commuted significant distances to their offices, none of those white employees serviced the Stockton office, whose members' union dues did not cover the office's operating costs. (*Mixon v. Fair Employment & Housing Com., supra*, 192 Cal.App.3d at pp. 1320-1321, 237 Cal.Rptr. 884.)

In contrast, Lane attempted to comply with his

(*Id.* at p. 856.) The court held that the plaintiff did not show the employer's stated reasons for laying off the plaintiff were pretextual for an illegal termination. (*Id.* at p. 859.) The *Nidds* opinion is inapposite, factually differing from the cause before us and providing no new guidance on parties' burdens of proof in race discrimination cases.

supervisors' orders, and was told that he met his employer's job requirements. While it is true that Lane expressed his desire not to work on classified material for religious reasons, this request was made in 1985, six years before he was removed from the KU Band. Likewise, his decision not to work after certain business hours was made years before the 1991 incidents, and was based on his long-standing church activities.

Jimmy Moore, who sued his employer for age discrimination, failed to produce any evidence of pretext, "either in connection with establishing his prima facie case or subsequently in response to Lilly's demonstration of a non- discriminatory reason for its action." (*Moore v. Eli Lilly & Co., supra*, 990 F.2d at p. 817.)

Unlike Moore, Lane proved that Hughes' reasons for not promoting him were pretext for a discriminatory reason. For example, although Goland found a white employee with Lane's same title and educational background, she significantly did not recall the white employee's performance evaluations and responsibilities. A legitimate comparison between employees requires knowledge of how an employee performs and what his duties are. The lack of such knowledge reveals the superficiality of Goland's investigation.

Another nondiscriminatory reason that Hughes gave for Lane's compensation and rank level was that Lane had a physics degree instead of an electrical engineering degree and that he did not obtain the degree until after he began work in 1977. However, there was evidence at trial that other, non-black employees ranked higher than Lane lacked bachelor's

degrees, and not everyone had an electrical engineering degree. Furthermore, no one controverted Lane's testimony that he studied engineering independently at home. More importantly, Lane satisfactorily performed his tasks. In fact, Mohler, whose laboratories Lane worked in at all relevant times, testified that Mohler never got complaints about Lane's technical abilities or performance. As Laboratories Manager, Mohler was ultimately responsible for the staff under him. Therefore, the fact that he heard no complaints suggests that Hughes' focus on Lane's educational background constituted a mere pretext for discriminating against Lane.

As for Lane's managerial skills, it is relevant that Mohler testified that he never received complaints about Lane's ability to work with people. This testimony pierces a hole in Hughes' excuses for taking Lane's managerial duties away from him.

Viewing the record as a whole and in deference to the jury's factual findings, we hold substantial evidence supported the verdict on Lane's race discrimination claim.

B. The Judgment Notwithstanding the Verdicts on the Retaliation Claims of Lane and Villalpando

In their respective complaints, Lane pleaded that Hughes unlawfully retaliated against him for complaining about race discrimination, and Villalpando pleaded that Hughes retaliated against him for opposing Hughes' race discrimination against Lane.

Retaliation claims under FEHA "are analogous to federal [Title VII] claims ..., and are evaluated under

federal law interpreting Title VII cases. [Citations.] [¶] The elements of Title VII and CFEHA claims require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal termination. [Citations.]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476, 4 Cal.Rptr.2d 522, fn. omitted.)

"To establish a prima facie case, the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action. [Citations.]" (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 476, 4 Cal.Rptr.2d 522.) Pretext for a company's nonretaliatory explanation for the employment action may be "inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Id.* at p. 479, 4 Cal.Rptr.2d 522.)

Hughes' reason for denying Lane a promotion after he filed his internal race discrimination complaint was that Hughes acted pursuant to Villalpando's request. While Miyata testified that he denied the promotion pursuant to Villalpando's request, Villalpando testified to the contrary. Where, as here, the evidence is in conflict, the reviewing court must defer to the findings of fact made in the trial court. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, 243 Cal.Rptr. 902, 749 P.2d 339.) Therefore, Villalpando's testimony undermines

Hughes' purported reason for not giving Lane the promotion Villalpando requested for 1991. However, even if Miyata's testimony were uncontroverted, given the fact that at this time Phillips, not Villalpando, was supposed to have been Lane's supervisor for months, Miyata's reliance on Villalpando constitutes a pretext for retaliating against Lane for filing the internal discrimination complaint.

Moreover, Mohler had authority to overrule decisions regarding promotions. In light of Phillips' satisfaction with Lane and Mohler's testimony that Lane was a good employee, Mohler's failure to overrule Miyata's denial of a promotion indicated that Hughes punished Lane for complaining about race discrimination.

With respect to Villalpando's retaliation claim, it is important to consider the purpose of the statutory law prohibiting employer retaliation against "whistle blowers." "Both the state and federal statutes are designed to foster open communication between an employer and its employees regarding perceived misconduct, encouraging employees to call their employers' attention to unlawful practices of which the employer might be unaware and which might result in litigation if not voluntarily changed. [Citation.] CFEHA goes even further than the federal statute by requiring that supervisors 'take immediate and appropriate corrective action' when harassment is brought to their attention. (Gov.Code, s 12940, subd. (h).) The statute then protects the supervisor who properly takes immediate corrective action from retaliation." (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 476, 4 Cal.Rptr.2d 522.)

Rather than protect Villalpando for supporting Lane's race discrimination claim, Hughes pressured Villalpando into creating a paper trail against Lane, in part by threatening to give McFarlane a promotion over Villalpando unless Villalpando cooperated. The company then penalized Villalpando for not completely cooperating in working against Lane. Significantly, Villalpando learned the promotion went to McFarlane just less than two weeks after Villalpando tried to salvage Lane's career by telling Miyata that Lane should be promoted to Phillips' assistant department manager - a position Solomon had initially misled Lane into believing he was already supposed to obtain. The timing of these events constitutes circumstantial evidence of retaliation.

Viewing the evidence in the light most favorable to Lane and Villalpando, a reasonable trier of fact could conclude that Hughes' articulated reasons for not promoting Lane and Villalpando are merely a pretext for retaliating against them.

C. The Judgment Notwithstanding the Verdict on Villalpando's Constructive Discharge Cause of Action

To establish constructive discharge, Villalpando had to plead and prove by a preponderance of the evidence that Hughes "either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part

of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251, 32 Cal.Rptr.2d 223, 876 P.2d 1022.)

Villalpando's complaint pleaded that Hughes required Villalpando to falsely document Lane's performance as poor after Lane filed an internal race discrimination grievance, that Hughes removed Villalpando from his supervisory position and demoted him "in a manner calculated to embarrass him personally and professionally" even though positions comparable to the one he was removed were available, and that Hughes refused to meet with Villalpando and resolve his complaints of Hughes' unfair treatment of Villalpando and Lane. In addition, the complaint asserted that Hughes coerced Villalpando "into criticizing and neutralizing or withdrawing his support" for Lane, and forced Villalpando to create a fictitious justification for Hughes' mistreatment of Lane because Lane complained about race discrimination and because Hughes "had an unspoken policy establishing an artificial barrier" preventing black employees from obtaining management positions and wages.

We hold that these allegations support a constructive discharge cause of action.

Hughes defends the judgment notwithstanding the verdict partly by quoting Turner as holding that "a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner v. Anheuser-Busch, Inc., supra*, 7 Cal.4th at p. 1247, 32 Cal.Rptr.2d 223, 876 P.2d 1022.) However, the

California Supreme Court recognized that "[i]n some circumstances, a single intolerable incident, such as ... an employer's ultimatum that an employee commit a *crime, may constitute a constructive discharge.*" (*Id.* at p. 1247, fn. 3, 32 Cal.Rptr.2d 223, 876 P.2d 1022.)

According to Villalpando's testimony at trial, Miyata threatened that McFarlane would be promoted over Villalpando unless Villalpando cooperated in creating false documentation against Lane. At two relevant time periods, Goland, whom Villalpando knew was an attorney and knew was handling Lane's internal complaint, urged Villalpando to sabotage Lane's career. The first occasion was in early June 1991, soon after Lane filed his internal complaint, and the second occasion was around the time Miyata threatened Villalpando with the denial of his own promotion. Clearly, this evidence indicates that Hughes' management tried to pressure Villalpando to commit the crime of perjury and to violate FEHA. We hold that such intolerable employer action would force a reasonable employee to leave his job. Therefore, there is substantial evidence in support of Villalpando's constructive discharge claim.

D. The Judgment Notwithstanding the Verdicts on Plaintiffs' Breach of Implied Covenant Claims

Lane's and Villalpando's respective complaints alleged that Hughes breached its implied covenant of good faith and fair dealing by evaluating the two employees arbitrarily and falsely, removing their managerial duties for arbitrary and untrue reasons, and refusing to place them in available, alternative

employment. Lane further pleaded that Hughes committed a breach by subjecting him "to higher and more onerous" performance standards than other employees, and not paying him at a level commensurate with his performance, skills and responsibilities. Villalpando pleaded that Hughes committed a breach by requiring Villalpando to violate the law and ethics by falsely documenting Lane's performance as deficient, and requiring Villalpando to conspire to subject Lane to adverse employment actions because he filed an internal discrimination grievance "and in observance of an unspoken but enforced glass ceiling" preventing blacks from advancing above a certain managerial level.

In opposition to the judgment notwithstanding the verdicts on the claims of breach of implied covenant, Lane and Villalpando cite *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 46 Cal.Rptr.2d 427, 904 P.2d 834 and *Garcia v. Rockwell International Corp.* (1986) 187 Cal.App.3d 1556, 232 Cal.Rptr. 490.

C. Byron Scott and Al Johnson sued Pacific Gas and Electric Co. (PG & E) for breach of an implied contract term not to demote employees without good cause. (*Scott v. PG & E, supra*, 11 Cal.4th at p. 460, 46 Cal.Rptr.2d 427, 904 P.2d 834.) Uncontradicted evidence at trial showed that PG & E intended to bind itself to written disciplinary policies which discussed demotion as an intermediate disciplinary step short of discharge. (*Id.* at p. 461, 46 Cal.Rptr.2d 427, 904 P.2d 834.) In contrast, the record in the instant case contains no evidence that Hughes intended to bind itself contractually as a result of any written policies, and Lane and Villalpando were not demoted in terms of

their rank levels. Instead, they were denied promotions.

While Lane and Villalpando are correct that the California Supreme Court in Scott, supra, 11 Cal.4th at page 464, 46 Cal.Rptr.2d 427, 904 P.2d 834, held that implied employment contract terms are not limited to the wrongful discharge area, this holding is inapposite here.

Like the plaintiffs in Scott, Joe Garcia in *Garcia v. Rockwell International Corp., supra,* 187 Cal.App.3d at page 1558, 232 Cal.Rptr. 490, sued his employer for being demoted. In addition, Garcia sued for being suspended without pay. Rockwell moved for and was granted summary judgment. (*Ibid.*) Not only is *Garcia* factually distinguishable, but it does not concern any contractual breach claims. Rather, the cause of action at issue in *Garcia* is for retaliation. (*Id.* at pp. 1558, 1560, 232 Cal.Rptr. 490.) The appellate court reversed on grounds based on tort, not contract, law. (*Id.* at p. 1562, 232 Cal.Rptr. 490.)

Nevertheless, since substantial evidence supports Lane's and Villalpando's claims under FEHA, *a fortiori* their claims of breach of the implied covenant of good faith and fair dealing must also withstand a judgment notwithstanding the verdicts.

E. The Judgment Notwithstanding the Verdicts on Damages

The trial court's order granting Hughes' motion for a judgment notwithstanding the verdicts with respect to damages mentions only one aspect of the verdicts, "front pay." According to the court order's

specification of reasons, front pay was not awardable as a matter of law "because both plaintiffs rejected unconditional offers of reinstatement." These offers were made during a one-day adjournment on October 5, 1994, after Hughes President Donald Cromer was advised of the jury's verdicts finding Hughes liable for discrimination and retaliation.

Whether Hughes' offers were in good faith and whether Lane and Villalpando were reasonable in rejecting the offers are questions for the jury as the trier of fact. (*Ortiz v. Bank of America National Trust and Savings Assoc.* (9th Cir.1987) 852 F.2d 383, 387.) Given the timing of the offers, it would have been reasonable for the jury to find Hughes did not make them in good faith.

In examining whether the damage awards were excessive, we try to uphold damage awards whenever possible. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61, 118 Cal.Rptr. 184, 529 P.2d 608.) However, examining each case on its own facts, the reviewing court should act where an award as a matter of law appears excessive. Whether an award "is so great as to shock the conscience of appellate judges and necessarily implies passion and prejudice on the part of the jury depends upon the nature and extent of the victim's injuries, his pain, suffering and humiliation, and the amount of special damages that may have been incorporated in the total award." (*Henninger v. Southern Pacific Co.* (1967) 250 Cal.App.2d 872, 882-883, 59 Cal.Rptr. 76.)

Looking at the record here, we note quite a few ambiguities and omissions. Plaintiffs' economist, Dr. Pickersgill, opined that Lane's lost bonuses at their

present value amounted to $67,000, and that his lost wages through his termination amounted to $238,596. While this figure is close to the jury's $295,000 economic damages award, the record is unclear when this termination date occurred, since Lane might still have been paid when he took his medical leave of absence in January 1992. A medical leave of absence would support an award for lost wages only if the leave of absence is without pay.

According to Lane's treating psychiatrist, Dr. Friedman, Lane could no longer work at a large corporation. Assuming this is the case and considering that Lane was 39 years old in 1994, he lost over twenty years of employment at a large corporation. This constitutes a significant period for anticipated future earnings. However, it is questionable whether or not the jury gave an excessive award of $2.3 million for loss of wages and work-related benefits after October 6, 1994. According to the testimony of Lane's wife and oldest son, as well as Lane's own testimony, Lane continued to volunteer for his church and worked with his wife on her home-based courier business created sometime after Lane stopped working for Hughes. It is uncertain whether these activities indicated Lane's ability to work full time, and whether Lane will contribute to making the courier business profitable.

The jury awarded Villalpando $125,000 for economic damages, yet Dr. Pickersgill did not testify as to her opinion relative to Villalpando's lost wages or other economic damages. Although Villalpando did not work from March 1992 to January 18, 1993, we cannot know from the record whether Villalpando received all of his paid leaves of absence, including for illness and

vacation. We also do not know how much Villalpando would have earned had he received the promotion instead of McFarlane. Another troubling section of the record is that the job Villalpando began in January 1993 evidently paid more than his job at Hughes, but the record is silent as to how much Villalpando earned at either position.

In view of the record, we cannot adequately review the economic damages award for Villalpando. Nevertheless, given Villalpando's managerial position in the high-paying aerospace industry, a $125,000 award for economic damages through October 6, 1994 may not be unreasonable.

As for the jury's award of $1.3 million for Villalpando's economic damages after October 6, 1994, the record is deficient in this area as well. While Dr. Pickersgill opined that Villalpando's work life expectancy ended at age 62.5 years, there was no testimony in the record on Villalpando's age, a relevant factor in deciding whether the $1.3 million award is excessive. Moreover, although Villalpando testified that he could no longer supervise others, the fact that he obtained a higher paying job than at Hughes may show his constructive discharge did not harm his future earning ability. On the other hand, he may have earned even more had he been promoted over McFarlane. However, how much more Villalpando would have earned is not in evidence. Notwithstanding the record's deficiencies, the fact that the jury awarded Villalpando $1 million less than Lane shows the jury considered that Villalpando was in a financially better situation than Lane. In deference to the jury as the trier of fact, we will not disturb this award.

We also defer to the jury's role as the trier of fact on the amount of noneconomic damages awarded to Lane and Villalpando. The jury's award of $1.5 million more to Lane than to Villalpando shows the jury recognized that Lane, as the direct victim of race discrimination, suffered more than Villalpando.

Review of the punitive damages awards requires consideration of two issues. The first issue is whether clear and convincing evidence shows the defendant was guilty of oppression, fraud, or malice. (Civ.Code, s 3294.) "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ.Code, s 3294, subds.(a) and (b).)

If the first preliminary issue is answered in the affirmative, punitive damages are recoverable. The second issue is whether substantial evidence supports the amount of punitive damages awarded.

With respect to the first issue as applied to corporate defendants, "[t]he determination whether employees act in a managerial capacity ... does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 822-823, 169 Cal.Rptr. 691, 620 P.2d 141.)

Pursuant to *Egan, supra*, the California Supreme Court deemed two employees "managing agents" for punitive damages purposes, even though the employees were lower in a company's hierarchy than

other corporate officials who participated in plaintiff Anand Agarwal's discharge. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 952, 160 Cal.Rptr. 141, 603 P.2d 58.) The court focused on the fact that the two employees "were directly responsible for supervising Agarwal's performance and had the most immediate control over the decision to terminate him." (*Ibid.*)

In rejecting the verdicts here, the trial court noted that there was no evidence of vicious racist remarks and epithets, and no statistical evidence of discrimination. The lack of such evidence, however, does not invalidate the punitive damages awards. That race discrimination can come in subtle, covert forms does not mean there is any less malice than found in the more blatant, overt forms.

As support for the judgment notwithstanding the verdicts, Hughes argues that *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 27 Cal.Rptr.2d 457 is on point because no officers or directors were involved in any decisions in the present case. This argument lacks merit, as Miyata, Solomon and Mohler were clearly managing agents for purposes of Civil Code section 3294.

In *Kelly-Zurian, supra,* Kathleen Kelly-Zurian sued her supervisor, Robert Lawicki, and her former employer, Wohl Shoe Co., for sexual harassment. Lawicki was the highest level Wohl employee in Southern California, but Wohl's corporate headquarters were in St. Louis, Missouri. The jury returned a verdict against Lawicki and for Wohl, finding that Lawicki's conduct involved oppression or malice. (*Kelly-Zurian v. Wohl Shoe Co., supra,* 22 Cal.App.4th at p. 407, 27 Cal.Rptr.2d 457.) Kelly-Zurian then moved for a new

trial on the issue of punitive damages with respect to Wohl. The trial court denied the motion. (*Id.* at p. 408, 27 Cal.Rptr.2d 457.)

Affirming the denial, the *Kelly-Zurian* court ruled that Lawicki was not a managing agent for purposes of Civil Code section 3294.

In so ruling, it considered the absence of evidence showing Lawicki was in a policy-making position and Wohl's evidence that Lawicki lacked authority to change or establish business policy in Southern California. The court also considered Lawicki's inability to even set Kelly-Zurian's salary or give her a raise without authorization from Wohl's corporate headquarters. (*Kelly-Zurian v. Wohl Shoe Co., supra*, 22 Cal.App.4th at p. 422, 27 Cal.Rptr.2d 457.)

In contrast, Mohler, Miyata and Solomon, who were based in Hughes' Southern California headquarters, admitted having authority regarding promotions, assignments, affirmative action and transfers. They clearly had control over Villalpando's and Lane's employment conditions.

Based on the record, we conclude that punitive damages were recoverable.

While the amount of punitive damages is not fixed or susceptible to mathematical calculation (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 790, 157 Cal.Rptr. 392, 598 P.2d 45), in determining the second issue of whether substantial evidence supports the amount of punitive damages, we consider the degree of reprehensibility of the defendant's conduct and the relationship between the amount of the award and the actual harm suffered. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d

980.) Although a defendant's financial condition is another factor to consider (*Ibid.*), we cannot adequately do so in light of the record. However, we do recognize the recent recession's impact on the aerospace industry and the federal government's cutbacks in the defense industry.

While race discrimination is clearly reprehensible, the punitive damages awards far exceeded the compensatory damages awarded here. The jury awarded 85 percent more in punitive damages for Lane than the $5,595,000 in total economic and noneconomic damages, and more than 91 percent more in punitive damages for Villalpando than the $3,425,000 in total economic and noneconomic damages.

Moreover, in contrast to the jury's award of less compensatory damages to Villalpando than to Lane, the jury awarded each plaintiff $40 million in punitive damages. The identical awards indicate the jury did not differentiate between the two plaintiffs' injuries. As a direct victim of race discrimination, Lane was entitled to a greater award than Villalpando.

Having concluded the punitive damages awards are excessive, we exercise our discretion to promote justice and the public policy of judicial economy by modifying the awards. We remand with directions to the trial court to reduce Lane's punitive damages award to $5 million and Villalpando's punitive damages award to $2,830,000.

II
NEW TRIAL ORDER ON LIABILITY DAMAGES AND PUNITIVE DAMAGES RESULTS FROM ABUSE OF DISCRETION

Pursuant to the California Supreme Court's directions, we reconsider the issue of the new trial order in light of *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at pages 932-933 and *Jones v. Citrus Motors Ontario, Inc., supra,* 8 Cal.3d at pages 710-711. The Supreme Court approved new trial orders in both those cases.

In *Neal,* the jury returned a $1,528,211.35 verdict which did not differentiate between compensatory and punitive damages. The trial court granted defendant's new trial motion on the ground that the damages were excessive, subject to the condition the new trial motion on the ground that the damages were excessive, subject to the condition the new trial motion would be denied upon plaintiff's consent to a reduction of the verdict to $749,011.48. Plaintiff consented to the remittitur. The Supreme Court approved the new trial order, finding "substantial supporting the record" for the order. (*Neal v. Farmers ins. Exchange, supra,* 21 Cal.3d at p. 932.)

"[T]he specification is adequate when, as here, it makes reference to those aspects of the trial proceedings which, in the trial court's view, improperly led the jury to inflate its award. Here the court pointed to three instances in which in its view plaintiff's counsel overstepped the bounds of proper conduct in a manner tending to inflame the jury against defendant. It also indicated certain factual circumstances of the case whose presentation before the jury, although relevant

and proper, tended to foster sympathy in favor of plaintiff. Finally, it made reference to the three guidelines . . . for the assessment of damages in light of a claim of excessive amount (i.e., proportion of punitive to compensatory damages, reprehensibility of conduct, and punitive effect) and indicated its conclusion, based upon an independent assessment of the evidence . . ., that the verdict was excessive under each of these tests." (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 932.)

In addition, where a new trial order is granted on the issue of excessive damages, "the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order . . . . The reason for this is that the trial court, in ruling on the motion, sits not in an appellate capacity but as an independent trier of fact." (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at pp. 932-933.)

The Supreme Court in *Jones* ruled, "An abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached under the theory expressed in the order for a new trial. [Citations.]" (*Jones v. Citrus Motors Ontario, Inc., supra*, 8 Cal.3d at p. 711.) Where a party appeals a new trial order based on the ground of insufficiency of the evidence to justify a verdict, "the trial court is required to state in its order the theory under which it concludes the jury should have returned a verdict for the moving party, and the order must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on that theory." (*Id.* at p. 710.)

That the *Jones* Supreme Court applied the abuse-of-discretion standard of review substantiates our prior rejection of Lane and Villalpando's original argument that the new trial order is reviewable de novo. Accordingly, a new trial order "will be affirmed if it may be sustained on any ground [citations], although the reviewing court might have ruled differently in the first instance. [Citations.]" (*Brandelius v. City & County of S.F.* (1957) 47 Cal.2d 729, 733-734.)

Recognizing the latitude *Neal* and *Jones* give trial courts in issuing new trial orders, we also note the differences between the cases. Significantly, unlike the trial court in the instant action, the trial court in *Neal* denied defendant's motion for a judgment notwithstanding the verdict. The fact that the *Neal* trial court denied one motion and granted another suggests that the court appropriately distinguished the different purposes and standards for motion for a judgment notwithstanding the verdict and a motion for a new trial. (Compare Code Civ. Proc., § 629 with Code Civ. Proc., § 65.) In contrast, the current order, granting a judgment notwithstanding the verdict and alternatively granting a new trial on liability and all damages, raises the issue of whether the trial court here made the appropriate distinction. We also note that the *Jones* opinion is silent on whether or not there was a motion for a judgment notwithstanding the verdict. In contrast, the motion for a judgment notwithstanding the verdict is very much at issue in the case at bar.

We also consider arguments made by the parties in response to our court's letter dated March 27, 2997. There, the parties were asked to file supplemental briefs on the following three issues. One, did the new trial

order comply with the requirement in Code of Civil Procedure section 657 that the trial court specify its factual reasons for granting a new trial? Two, was the order granting a new trial on the ground of excessive damages erroneous for lack of substantial support in the record? And three, did Lane and Villalpando show that no reasonable trier of fact could have found for Hughes on the theories stated in the order?

In considering Hughes' supplemental brief, we initially note two matters. First, Hughes no longer urges affirmance of the new trial order on the issue of liability. Accordingly, we consider the order only with respect to damages. Second, by incorporating by reference part of its petition for review to the Supreme Court, Hughes exceeds our page limit without seeking our permission. Absent an application for permission to exceed our page limit which sets forth facts showing good cause for granting the application (Cal.Rules of Court, rule 43), we refuse to consider Hughes' petition for Supreme Court review.

With respect to the first supplemental briefing issue of whether the new trial order adequately states factual reasons for granting a new trial pursuant to Code of Civil Procedure section 657, Hughes lists seven factual areas. These areas are (1) Lane's first promotion, (2) his pay classification on the KU Band project, (3) his removal from the project, (4) his post-KU Band assignment, (5) Lane's job performance between May and November 1991, (6) Villalpando's claim that he was pressured to falsely report on Lane's performance, and (7) McFarlane's selection over Villalpando when their departments merged. Since Hughes no longer asks us to uphold the new trial order on the issue of liability,

we do not revisit these factual areas.

Code of Civil Procedure section 657 requires a court which grants a new trial to "specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated." At issue here is whether the court's factual reasons support the statutory grounds for granting Hughes a new trial. In its order, the trial court specified it alternatively granted a new trial on the grounds that insufficient evidence supported the verdicts, that the damage awards were excessive, that plaintiffs' trial counsel engaged in misconduct resulting in an irregularity in the proceedings which denied Hughes a fair trial, and that the trial court committed legal errors.

Since we analyzed whether sufficient evidence supports the verdicts with respect to the judgment notwithstanding the verdicts, we focus on the issues of attorney misconduct and trial court error.

In ruling that plaintiffs' trial counsel engaged in misconduct that resulted in an irregularity in the proceedings preventing Hughes from having a fair trial, the trial court referred to counsel's closing argument. The trial court's order stated, "The court has highlighted 37 pages out of 100 of inflammatory remarks and 'buzz words' to inflame the jury."

A review of the closing argument of plaintiffs' counsel at the end of the trial's first phase indicates that defense counsel did not object to the portions of the argument that the trial court referred to,[14] and that

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[14] In fact, the only objection defense counsel made was when plaintiffs' counsel instructed the jury on the law.

plaintiffs' counsel made arguments derived from the evidence presented at trial. Significantly, after closing argument, the trial court instructed the jury that the attorneys' statements are not evidence. While plaintiffs' counsel mentioned the word "money" at the close of his rebuttal argument, the word was used only once, in the analogy of a personal injury verdict as "a language called dollars." Given that this was a civil damages case, plaintiffs' counsel's isolated and brief reference to money was not prejudicial.

The trial court also specified that it granted a new trial because it erred in allowing a treating chiropractor to testify that one of the plaintiffs told the chiropractor that "plaintiff would never be able to work again." The court additionally stated it was "error not to instruct the jury that the attorney fees were not included in the award." In view of the entire record, the erroneous admission of hearsay does not merit a vacating of the jury verdicts. As for the absence of the jury instruction at issue, our research shows no case law or BAJI instruction on excluding attorney fees from awards. This is because there is no requirement to instruct juries on excluding attorney fees from their awards.

Also at issue is whether the court's factual reasons support the statutory grounds specified in Hughes' motion for new trial. This is because Code of Civil Procedure section 657 requires the upholding of a new trial order "if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons," except where the statutory ground of insufficiency of evidence, excessive damages or inadequate damages is cited.

Hughes' motion for a new trial asserts three errors in

law, excluding arguments of excessive damages.[15] One, Hughes contended it was error to award Lane and Villalpando "front pay" because they rejected unconditional offers of reinstatement made after the liability verdicts were returned.

Two, Hughes argued in a footnote in its memorandum of points and authorities that the trial court erroneously denied Hughes' motion for a mistrial based on juror misconduct. Without a supporting declaration, Hughes stated that the misconduct occurred during deliberations in the final punitive damages phase of the trial. According to Hughes' memorandum of points and authorities, one juror felt threatened by the receipt of a note stating, "If you decide not to choose, you've already made the wrong choice."[16] Absent evidentiary support, factual assertions made in legal argument cannot stand.

The third legal error argued by Hughes in its motion for new trial was that the trial court improperly admitted evidence of acts before February 1991. Since this argument is related to liability, we do not consider its merits.

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[15] With respect to the issue of excessive damages, Code of Civil Procedure section 657 prohibits the granting of a new trial on the ground of excessive damages "unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."

[16] No other juror misconduct was asserted by Hughes.

While the trial court's order sets forth many factual reasons for granting a new trial, many of these facts do not take into account the conflicting evidence in support of the jury verdicts. We discuss the portions of the order concerning compensatory damages and punitive damages.

The portions of the trial court's order related to Lane's economic damages state that his expert's opinion, that Lane was entitled to $247,000 in back pay and $2.1 million in front pay, was based on assumptions not supported by evidence by four reasons. "First, this assumes that his salary would be the same as employees classified as an operation manager. Lane was never classified as an operations manager and there is no evidence that he should have been even if he received a promotion to senior project engineer in 1991. Second, Lane assumes that had he remained at Hughes, he would have continually advanced through department manager, division manager, and up to laboratory manager." The trial court concluded such advancement was unlikely because "the self-imposed restrictions on the type of work Lane was willing to do would prevent him from moving into management positions" and because aerospace industry setbacks decreased many managers' duties. "Third, Lane claims that although he is only 39 years old he will never be able to work another day in his life. The evidence shows that he works as a dispatcher in his wife's courier service three days per week and keeps track of the billing and other financial matters." Four, the trial court noted that Lane spends four to five hours a week going door to door as a Jehovah's Witness. The trial court then made the bald

conclusion that "[t]here was uncontradicted evidence that someone in Lane's position could have found a comparable job to that which he held within Hughes within 6 to 18 months whether limited to the aerospace industry or not."

In addition, the trial court relied on the testimony of Lane's then-14-year-old son, who mentioned "that the courier business was his dad's business. Further, in the court's observation of Lane for the last two months, he appears mentally and physically alert, he does not appear to be distressed or have any physical or mental problems." The trial court's reliance on a young and possibly scared teenager's opinion is surprising, given that prior to Lane's departure from Hughes, Lane was the sole provider of the family and his wife was a stay-at-home mother. It is also surprising that the trial court relied on Lane's appearance in court, especially since he complied with the court's instructions at the onset of the case. Prior to the commencement of the jury trial, the court told counsel, "I know your clients are demonstrative, and Mr. Lane was crying or appeared to be crying or sad the other day, but be careful about facial expressions of the plaintiffs relating to the jury . . . So advise them of that, if I see that, they'd have to be excluded if there is a problem."

Regarding Villalpando's economic damages, the trial court likewise specified in its new trial order that Villalpando's expert made assumptions not supported by the evidence. The trial court wrote, "First, Villalpando assumed he would have received a pay increase in November 1991 if he received the promotion to acting manager of the RF department instead of McFarlane. The evidence showed that McFarlane did

not receive a pay increase upon getting the promotion. Second, Villalpando assumed he would have continued to receive promotions up to the division manager level. The evidence at trial showed that the position no longer existed at Hughes. Further, managers above Villalpando had their responsibilities decreased because of the conditions in industry. . . Third, Villalpando assumed he would never be in management at the aerospace corporation. This assumption is based entirely on Villalpando's self-serving testimony that he would not accept a management position because of what had happened at Hughes."

The trial court added that front pay was inappropriate because Lane and Villalpando rejected Hughes' unconditional reinstatement offer. Given that Hughes made the offer only after being advised of the jury's liability verdicts, it was improper for the trial court to rely on this fact as a reason in support of the new trial order.

Regarding plaintiffs' emotional distress damages, the trial court specified that the damage awards were excessive and contrary to the evidence because they were based on "self-serving descriptions by plaintiffs and members of the families of bad feelings, which do not even require continuing psychological counseling." The trial court's assessment of Lane's and Villalpando's need for psychological counseling is not supported by the evidence. Lane's tearfulness prior to the trial indicated his difficulty in controlling his feelings. Given the traditional families both men wanted and had prior to leaving Hughes, it is unquestionable that the financial need to have their spouses return to work

had a negative psychological impact on Lane and Villalpando, especially since they had children three years of age and younger at the time of trial.

As for punitive damages, the trial court listed the following ten facts as critical to measure the severity of Hughes' conduct. "1. Neither plaintiff was discharged: Lane remains a Hughes employee to this day, on medical leave of absence; Villalpando voluntarily left Hughes (for the second time) to take a better paying position in another aerospace company in the same part of town. [¶] 2. Both plaintiffs received raises and promotions, as well as other employment opportunities within Hughes that they chose not to pursue. [¶] 3. Neither plaintiff has been the victim of any racist slurs or epithets. [¶] 4. There is no statistical evidence showing any pattern of discrimination at Hughes. [¶] 5. A white employee hired at the same time as lane and with the same credentials and experience as Lane was earning exactly the same salary as Lane in 1990 and was at the same job level. [¶] 6. Four employees removed from projects in Mohler's lab in the same period that Lane was removed from the KU Band project were white or Hispanic. [¶] 7. Seven employees scheduled for promotion in 1991 but who were not promoted were white (5) and Asian 92). [¶] 8. A black employee received a promotion to senior project engineer in 1991 at the same time that the non-black employees were not promoted. [¶] 9. During a time when thousands at Hughes were laid off, Lane and Villalpando were not only retained, but promoted and given salary increases. [¶] 10. Lane had announced plans to leave Hughes due to religious reasons, but management found work fitting within his unique requirements and asked him

to stay."

With respect to the third fact the trial court listed, the absence of blatant racial epithets in a sophisticated corporation such as Hughes does not lessen the evils of race discrimination and retaliation. As for the lack of statistical evidence, the case law clearly holds that circumstantial evidence is sufficient. Moreover, we could not find in the record any evidence of thousands of layoffs at Hughes, and even if such evidence exists, it is irrelevant in and of itself.

In response to our court's second question of whether substantial evidence supported the new trial order on the ground of excessive damages, Hughes notes in its supplemental brief that Lane's $3.5 million noneconomic damages award is 3.2 times higher than the "highest in history," that Villalpando's noneconomic damages award is 1.8 times higher than the "highest in history" and that both plaintiffs' punitive damage awards are 48 times higher than the "highest in history." However, the fact that a damages award is precedent-shattering does not render the award excessive. (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 261.)

"The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion in to the realm of factfinding." (*Bertero v. National*

General Corp., supra, 13 Cal.3d at p. 65, fn. 12.)

In response to our prior opinion's reduction of the excessive punitive damage awards, Hughes argues that we should direct the trial court to decide the amount of the remittitur in the first instance. As support for this argument, Hughes relies primarily on *Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1606-1607. There, Division Four of our district remanded the cause of reconsideration of the defendant's new trial motion on the issue of punitive damages subject to the condition that the motion had to be denied if the plaintiff consented to a remittitur the trial court was to issue on remand.

Significantly, the *Teitel* court did not rule that it was prohibited from issuing a remittitur. (*Teitel v. First Los Angeles Bank, supra,* 231 Cal.App.3d at p. 1606.) Instead, the court quoted the portion of *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 stating, "The trial court is in a far better position than an appellate court to determine whether a damage award was influenced by 'passion or prejudice.' (Code Civ. Proc., § 657.) In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility." Unlike Hughes, the defendants in *Schroeder* did not move for a new trial. Instead, they challenged the damage award for the first time on appeal. *Schroeder v. Auto Driveaway Co., supra,* 11 Cal.3d at p. 919.) Therefore, *Schroeder* is factually distinguishable from the present case.

Hughes also relies on *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at page 932, as well as federal opinions

outside of California, to argue against our issuance of a remittitur. We need not consider the federal opinions, in light of the existence of state case law directly concerning the remittitur issue. As for *Neal*, it does not prohibit reviewing courts from modifying judgments. Rather, the portion of *Neal* which Hughes quotes merely stated that where a new trial order is based on excessive damages, "whether or not such order is conditioned by a demand for reduction, the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the order." (*Ibid.*)

Contrary to what Hughes argues, California courts of appeal may issue their own remittiturs, as was done, for example, in *Allard v. Church of Scientology* (1976) 58 Cal.App.3d 439, 453-454 and *Gerard v. Ross* (1988) 204 Cal.App.3d 968, 980, 989. Given the record here, it is proper for us to modify the punitive damages awards in order to do justice.

In response to our court's third supplemental briefing question whether Lane and Villalpando showed that no reasonable trier of fact could have found for Hughes on the theories stated in the new trial order, Hughes contends Lane and Villalpando could not meet this burden of proof. Based on the entire record, reviewed in light of *Neal, supra*, and *Jones, supra*, we conclude that Hughes' contention lacks merit, and the trial court's grant of a new trial cannot be sustained on the grounds cited by Hughes or the trial court.

We hold that the trial court abused its discretion in alternatively ordering the new trial.

III
ARGUMENTS AGAINST EVIDENTIARY RULINGS, JURY INSTRUCTION AND DENIAL OF MOTION TO DISQUALIFY DEFENSE COUNSEL MOOTED BY UPHELD JURY VERDICTS

Lane and Villalpando contend the trial court made three evidentiary errors, the exclusion of two experts in the liability phase of the trial, the exclusion of Villalpando's treating psychotherapist and designated expert in the damages phase of the trial, and the admission of certain mitigation evidence in the trial's final punitive damages phase. They also argue that the trial court erroneously instructed the jury that Lane could not recover damages accruing before a certain time. Lastly, Lane and Villalpando maintain that the trial court erred in refusing to grant their motion to disqualify Hughes' defense counsel, the Paul, Hastings, Janofsky & Walker law firm.

Regardless whether or not these contentions have merit, the issues they raise are mooted by our decision to uphold the jury verdicts in favor of Lane and Villalpando. Accordingly, we do not consider the trial court's evidentiary rulings, jury instruction and denial of the motion to disqualify Paul, Hastings, Janofsky & Walker.

DISPOSITION

The judgment notwithstanding the verdicts is reversed, and the cause remanded with directions to enter a judgment heretofore entered on December 23,

1994, for plaintiffs on the jury verdicts, with further directions to modify said judgment to award plaintiff Lane $5 million in punitive damages and plaintiff Villalpando $2,830,000 in punitive damages. Costs on appeal are awarded to appellants.

JOHNSON and WOODS, JJ., concur.